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Supreme Court of the United States

OCTOBER TERM, 1940

314-638

No. 164

NORMAN B. PITCAIRN AND FRANK C. NICODEMUS, JR., RECEIVERS OF WABASH RAILWAY COMPANY, A CORPORATION, PETITIONERS,

vs.

RICHARD F. WILD

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI AND BRIEF IN SUPPORT THEREOF.

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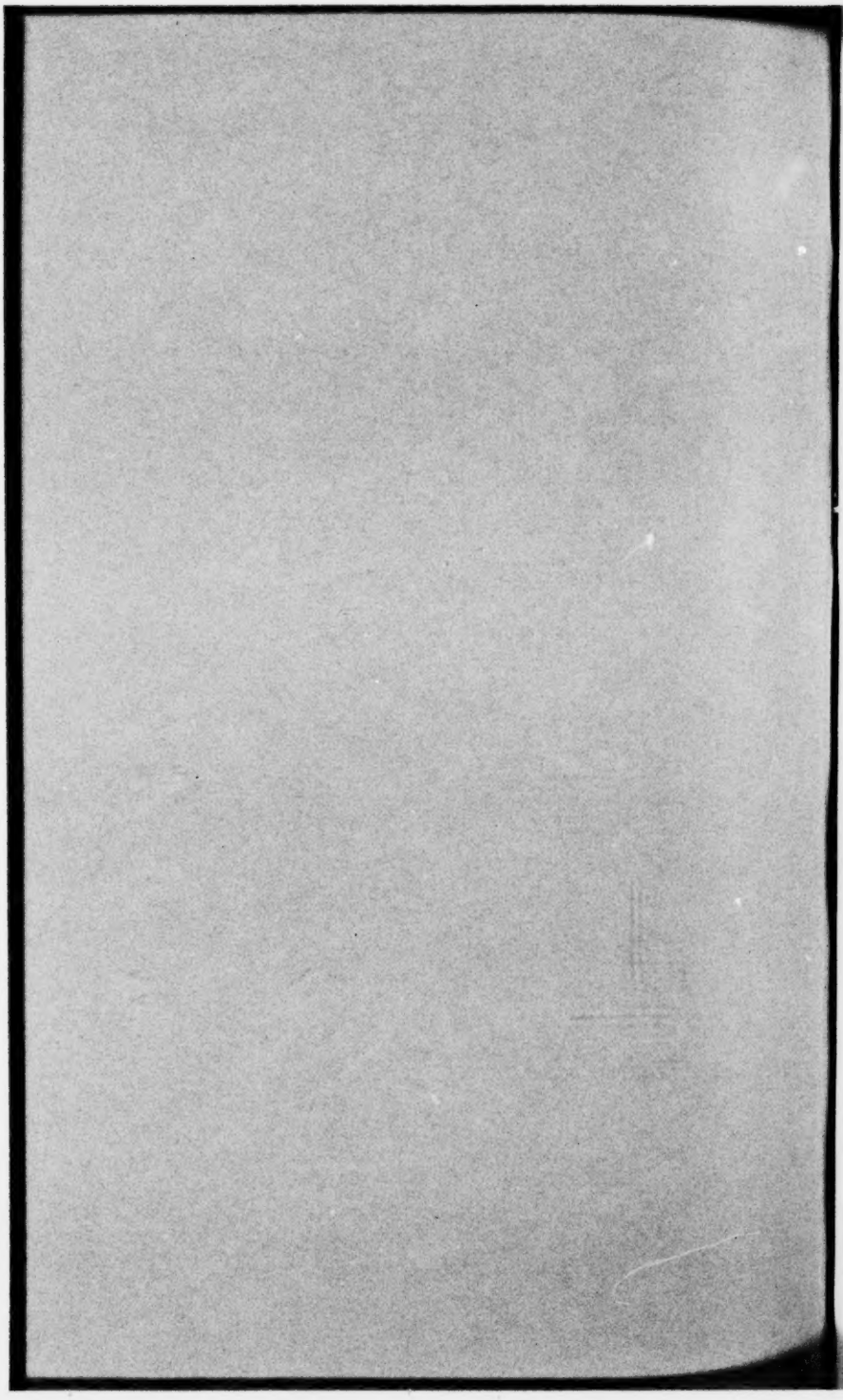

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Supreme Court of the United States

OCTOBER TERM, 1940

No._____

NORMAN B. PITCAIRN AND FRANK C. NICODEMUS, JR., RECEIVERS OF WABASH RAILWAY COMPANY, A CORPORATION, PETITIONERS,

vs.

RICHARD F. WILD

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI AND BRIEF IN SUPPORT THEREOF.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of Wabash Railway Company, a cor-

poration, duly appointed and acting as such Receivers under the decree and orders of the United States District Court for the Eastern District of Missouri, Eastern Division, respectfully pray that a writ of certiorari issue out of this Court directed to the Supreme Court of Missouri to review the judgment of the Supreme Court of Missouri, Division Number One, in the case of Richard F. Wild, Respondent, vs. Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of Wabash Railway Company, Appellants.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The judgment of the Supreme Court of Missouri, which the petitioners seek to have reviewed, was entered in Division Number One of that Court and determined rights set up and claimed by the plaintiff, which were sustained by the State Court, and immunities set up and claimed by the defendants, which were denied by the State Court, under the Federal Employers' Liability Act (Sections 51 to 59, Chapter 2, Title 45, United States Code), and the Federal Safety Appliance Act of April 14, 1910 (Sections 11 to 15, inclusive, of Chapter 1, Title 45, United States Code). The decision became and is the final judgment of the highest court of Missouri by reason of the overruling by that Court on April 18, 1941 (R. 373), of appellants' (petitioners') motion to transfer the cause to the court en banc. The opinion of Division Number One of the Court was filed on February 14, 1941 (R. 335), and provided that the judgment of the Circuit Court of St. Louis, for $20,000, would be

[NOTE.—Pertinent sections of the Federal Employers' Liability Act; the Federal Safety Appliance Act of April 14, 1910, Sections 11 to 15, Title 45 U. S. Code; Provisions of Missouri Constitution; and Rules 21 and 24 of Missouri Supreme Court appear in Appendix.]

affirmed if the plaintiff (respondent) would enter in said Supreme Court a remittitur of $5,000, within ten days, otherwise the judgment would be reversed and the cause remanded (R. 335, 348). The respondent (plaintiff) filed the remittitur required on February 20, 1941 (R. 349), and on the same day the Court, Division Number One, entered a judgment affirming the judgment of the Circuit Court for $15,000 (R. 350). The appellants (petitioners) on February 24, 1941 (R. 350, 351-355), filed their motion for a rehearing (R. 350, 351) and suggestions in support (R. 346), within ten days after the opinion of Division Number One of the Court was filed, as provided by Rule 21 of the Rules of the Missouri Supreme Court. The appellants' motion for a rehearing was overruled on March 13, 1941 (R. 364), and on March 22, 1941, appellants (petitioners) filed in Division Number One of the Court their motion to transfer the cause to the Court en banc (R. 364, 365-368), on the ground that Federal questions were involved within the meaning and provisions of Section 12 of Article 6, and Section 4 of the Amendment of 1890 to Article 6, of the Constitution of Missouri, as provided by Rule 24 of the Missouri Supreme Court. The Division Number One on April 18, 1941, overruled appellants' (petitioners') motion to transfer the cause to the court en banc (R. 373) and thereupon the judgment of the Court became the final judgment and decision of the state court of last resort on that day, April 18, 1941.

The opinion in the case has not been officially reported, but appears as Wild vs. Pitcairn, in 149 South Western Reporter, Second Series, page 800. It is in the Transcript of Record at pages 336 to 348, inclusive.

The jurisdiction of the Supreme Court of the United States is invoked under the provisions of Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925, C. 229, Sec. 1, 43 Stat. 937; 28 United States Code,

Sec. 344 (b), and Rule 38 of the Rules of the Supreme Court of the United States, on the ground that real and substantial Federal questions were and are involved in said cause and were directly presented to and decided by the State Court, in that the plaintiff specially set up and claimed a right under the Federal Employers' Liability Act and the Federal Safety Appliance Act to compensatory damages for injuries received and his Federal claim was sustained, and defendants specially set up and claimed immunity from liability under said acts, and their claim was denied. The Federal questions are not merely colorable and the petitioners believe that they have not been heretofore decided by this Court.

The cause was commenced in the Circuit Court of the City of St. Louis, Missouri, on August 15, 1938, by Richard F. Wild to recover for personal injuries received by him while employed by the petitioners as a switchman at St. Louis, Missouri, on February 18, 1938. The plaintiff's ground for recovery was that he was injured while engaged in interstate commerce by falling from a car and that his injuries "directly and proximately resulted from defendants' failure to perform their duty under the statutes of the United States (commonly known as the Federal Safety Appliance Act), and the orders, rules and regulations of the Interstate Commerce Commission of the United States, made and promulgated pursuant thereto, in such cases made and provided, to have said box car equipped with an efficient handbrake" (R. 3).

The petition (R. 3) also alleged that the defendants were the duly appointed Receivers of Wabash Railway Company and were at all times mentioned in the petition in charge of and operating the properties and equipment of Wabash Railway Company as a common carrier and engaged in interstate commerce and transportation by railroad; that

on and prior to February 18, 1938, plaintiff was "working as a switchman in, upon and about defendants' cars, trains and locomotives on the line of defendants" and on said day was working as such employee "in, upon and about trains and cars which were then and there being hauled, used, moved, transported and classified on defendants' lines in the defendants' Luther Avenue yard in the City of St. Louis, Missouri, and in the furtherance of interstate commerce and transportation by railroad, and while plaintiff was engaged in the furtherance of interstate transportation and commerce by railroad, plaintiff was upon a box car and did attempt to operate a handbrake thereon; that said handbrake was inefficient and did suddenly, violently, and unexpectedly spin, turn, twist, revolve, vibrate and chatter, directly thereby causing plaintiff to be thrown from said box car to the ground and to sustain the injuries hereinafter more particularly alleged, all of which directly and proximately resulted from defendants' failure to perform their duty, under the Statutes of the United States of America (commonly known as the Federal Safety Appliance Act), and the orders, rules and regulations of the Interstate Commerce Commission of the United States made and promulgated pursuant thereto, in such cases made and provided to have said box car equipped with an efficient handbrake."

The petition then alleged that "as a direct and proximate result of defendants' aforesaid failure to comply with the aforesaid laws of the United States and the aforesaid orders, rules and regulations of said Interstate Commerce Commission" that is, to have the Louisville and Nashville Company's car, which defendants had just received from that railroad and from which car the plaintiff fell and was injured, equipped in accordance with such regulations, he received the injuries complained of.

The answer of the defendants admitted that they were the Receivers of Wabash Railway Company and were operating trains as common carriers in interstate commerce, and denied every other allegation of the petition (R. 4, 5).

On the voir dire examination of the jury the Court over defendants' objection ruled that plaintiff was not required to prove that the handbrake was defective, but was only required to show that it did not operate (R. 9). The Supreme Court of Missouri, Division Number One, approved this ruling of the Circuit Court (R. 338).

The evidence at the trial showed that plaintiff Wild was injured about 6:40 p. m. February 18, 1938, when he fell from Louisville & Nashville Railroad Company's car 12670 while employed as a switchman in the Luther Avenue yards of the Wabash Railway in St. Louis, Missouri.

The Louisville & Nashville car 12670 containing an interstate shipment of freight, arrived on the afternoon of February 18th at East St. Louis, Illinois, to which point it had been hauled by the Louisville & Nashville Railroad (and there delivered to the Terminal Railroad Association). It was hauled from East St. Louis, Illinois, to St. Louis, Missouri, by the Terminal Railroad Association and at 6:15 p. m. was placed by that carrier with other cars on the delivery track of the Wabash in the Luther Avenue yards to be inspected by the Wabash and accepted if no defects were found. The car was there inspected by Wabash inspectors and no defects were found. It was then taken a short distance by a switch crew, of which Wild was a member, to the switch yards of the Wabash to be placed on a track with other cars to leave St. Louis in a train about 8:00 p. m. and hauled by the Wabash to a point in Iowa (R. 22, 23, 24, 213, 214, 215, 218, 220, 241, 242, 245).

The car, Louisville and Nashville 12670, was cut off from other cars being classified in the switch yard and moved

southward on a slightly downgrade track. The handbrake on the car Louisville and Nashville 12670 as it moved southward was on the north end of the car at the right of the center of the car (see Defendants' Exhibits 10 and 11, facing R. pp. 125, 126). The plaintiff climbed to the brake platform on the north end of the car shown in Defendants' Exhibit 10, and stood upon the platform facing to the south to set the brake to retard the movement of the car.

Defendants' Exhibits 10, 11 and 12 are photographs of the car in question, Louisville and Nashville 12670, which were taken the morning after the injury and while the car remained in the Luther Avenue yards. In the photograph, Exhibit 10, the brake staff is designated by the figure 1. The dog or pawl is designated by the figure 2. One end of it meshes in the cogs of the ratchet wheel, marked by the figure 3, when the brake wheel is turned and sufficient pressure is applied at the other end of the pawl. The brake staff was square where it fitted into the square hole in the ratchet wheel. The ratchet wheel rested upon a metal plate or trunnion, bolted to the upper side of the platform. On the end and opposite the end where the pawl was placed, was a guard, marked by the figure 4, which extended over the edge of the ratchet wheel and held it in place between the metal plate or trunnion on which it rested and underside of the guard (R. 85, 86).

It had been raining and the brake platform on which plaintiff stood was wet and sleety (R. 87, 104), at the time plaintiff fell from the car, and he wore chamois skin gloves and rubber overshoes at the time (R. 104). He testified that he turned the brake wheel clock-wise or from left to right and felt that the brake chain was tightening on the brake staff (see Defendants' Exhibit 11, facing R., page 126 and Defendants' Exhibit 12, facing R. page 164). He pressed

his foot against the dog or pawl, marked with figure 2 on Defendants' Exhibit 10, and as he turned the brake wheel from left to right and every time he turned the brake wheel he heard the dog clicking in the cogs of the ratchet wheel as it turned when he turned the brake wheel and shaft. He testified that when the dog is clicking in the ratchet wheel it is holding (R. 13, 87, 104, 108). He testified he gave the brake wheel three or four turns and it suddenly revolved in the reverse direction, that is, from right to left, and he fell from the car and was injured, his left arm being fractured at the elbow joint. Immediately after plaintiff fell, the foreman of the switch crew, who was near the car while the plaintiff was setting the brake, went onto the brake platform to get the plaintiff's lantern which he had left there when he fell and found that the brake was set with the end of the dog firmly meshed in the cogs of the ratchet wheel. He then examined the lower end of the brake staff and the brake chain and found that the brake chain was wound around the lower end of the brake staff (see Defendants' Exhibit 11, R. 126, and Defendants' Exhibit 12, R. 164). (R. 272, 273, 276, 278.)

Within a few minutes after the accident two car inspectors employed by the petitioners examined the car and found that the brake was set and that it was in proper working condition when they released it and set it again. A few hours after the injury, the Superintendent and Train Master of the petitioners inspected the car and found that there were no defects and nothing about the brake that was inefficient. The car was held in the yards and on the following morning was given a complete examination by the Yard Master, a car repairer and the General Car Foreman, and they then found that the brake and brake equipment were in perfect condition and complied with all the requirements of the Interstate Commerce Commission reg-

ulations and no repairs were made or needed on the car. (R. 244, 245, 246, 254, 255, 257, 260, 261, 262, 266, 267, 268, 269.)

The plaintiff proved on cross examination of the switch foreman, Erting, that he heard the brake grab and "squealing" after plaintiff got on the car to set the brake (R. 284, 285). The plaintiff on rebuttal then proved over defendants' objections and exceptions that a flat place on the car wheel, even though less than two and a half inches long, which was the minimum size noted by car inspectors (R. 253), would chatter the brake-shoe and the whole hand-brake rigging, causing the brake-shoe to climb or rise on the wheel, put it out of its proper alignment and cause it to make a pronounced noise so "that you can hear the squeal of it when it is going by you" (R. 306, 308).

The plaintiff also proved over defendants' objections and exceptions that after an accident occurs you cannot make a test when the car is motionless so as to determine whether a flat place on a car wheel would cause the knocking noise, or "chattering", and might permit the brake-shoe to climb or raise on the wheel (R. 308, 309).

The plaintiff also proved on rebuttal over defendants' objections and exceptions that "chattering" is a common term used among switchmen and is a quivering of a brake-shoe caused, probably, by a flat place or a roughness of the surface of the wheel (R. 310).

The jury returned a verdict for the plaintiff for $20,000 and judgment was rendered thereon for that amount. The petitioners (defendants) appealed to the Supreme Court of Missouri and Division Number One of that court affirmed the judgment of the Circuit Court upon condition that the plaintiff, within ten days, enter a remittitur of $5,000 (R. 348). The remittitur was entered and the judgment of the Supreme Court, Division Number One, was entered on

February 20, 1941. The petitioners in due time and within ten days thereafter, filed their motion for rehearing in accordance with the rules of the Supreme Court of Missouri. The petitioners' motion for rehearing was overruled by an order of the Court entered on March 13, 1941 (R. 364). Thereafter and on March 22, 1941, and within the time allowed and provided by the rules of the Court, the petitioners (appellants) filed in said cause their motion to transfer the cause to court en banc (R. 364), which motion to transfer to the court en banc was by the Court overruled on April 18, 1941 (R. 373), and upon the overruling of the motion of the petitioners to transfer the case from Division Number One to the court en banc, the judgment of Division Number One of the Supreme Court of Missouri became the final judgment of the court of last resort of the State.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

The petitioners believe there are special and important reasons for a review by the Supreme Court of the United States of the judgment and decision of the Supreme Court of Missouri, upon which they rely for allowance of the writ of certiorari, as follows, to-wit:

1. The Federal Safety Appliance Act, upon which this suit was based, the Act of April 14, 1910, now Sections 11, 12, 13, 14 and 15 of Chapter 1, Title 45, United States Code, only makes it unlawful for any common carrier "to haul, or permit to be hauled, or used on its line, any car subject to the provisions of this chapter not equipped with appliances herein provided for". The plaintiff's petition in this case (R. 3) alleged and based the right to recover on the

allegation that plaintiff's injuries "directly and proximately resulted from defendants' failure to perform their duty, under the statutes of the United States of America (commonly known as the Federal Safety Appliance Act), and the orders, rules and regulations of the Interstate Commerce Commission of the United States made and promulgated pursuant thereto, in such cases made and provided, to have said box car equipped with an efficient handbrake". The petition then alleged: "Plaintiff further states that, as a direct and proximate result of defendants' aforesaid failure to comply with the aforesaid laws of the United States of America and the aforesaid orders, rules and regulations of said Interstate Commerce Commission", plaintiff sustained the injuries sued for.

The state courts erroneously interpreted and applied the provisions of the Federal Statutes by holding that the plaintiff was entitled to recover in this action for hauling the car with a handbrake alleged to have been deficient, when the petition was based upon the failure of these defendants to have the car of the Louisville and Nashville Railway Company equipped with an efficient handbrake. The state courts affirmed the judgment based upon a cause of action stated in plaintiff's petition, which alleged and sought a recovery upon a state of facts not made unlawful by the provisions of the Federal Safety Appliance Act. The mere existence of "inefficient brakes" on a car is no violation of the statute pleaded, and did not authorize a recovery in this suit. The plaintiff was not entitled to recover for failure of the petitioners to equip the Louisville & Nashville car.

2. The state court erroneously ruled that the plaintiff was entitled to recover although the handbrake was not defective and thereby erroneously interpreted and applied

the provisions of the Federal Safety Appliance Act relating to handbrakes, approved April 14, 1910 (Sections 11 to 15, inclusive, of Chapter 1 of Title 45, United States Code), whereas the statute seems clearly to provide that liability for violation of the Act is conditioned upon proof and finding that the equipment alleged to have caused the injury was defective at the time. Sections 3 and 4 of the Act (Title 45 U. S. Code, Sections 13 and 14) show that Congress intended only to make unlawful the using of a car which had a defective equipment.

The state court erred in approving the statement of counsel for the plaintiff on voir dire examination of the jury, to-wit: "We are not required to prove any defect; we simply prove it didn't operate" (R. 9)., and by the giving of plaintiff's instruction number one which authorized the jury to return a verdict for plaintiff without requiring a finding from the evidence that the handbrake equipment was defective (R. 315, 316).

The State Supreme Court (R. 338) erroneously interpreted and applied the provisions of the Federal Safety Appliance Act by holding that the plaintiff was entitled to recover without proof and a finding by the jury that the handbrake was defective.

3. The state court erred in holding that the plaintiff was entitled to recover under his allegation that his injury "directly and proximately resulted from defendants' failure to perform their duty under the statutes * * * and the orders, rules, and regulations of the Interstate Commerce Commission of the United States, made and promulgated pursuant thereto, in such cases made and provided, to have said box car equipped with an efficient handbrake", for the reason that there was no evidence that the handbrake equipment failed in any particular to comply with

the rules, orders and regulations of the Interstate Commerce Commission, made pursuant to the requirements of the Safety Appliance Act (Section 12, Title 45, United States Code), which expressly provides that "the number, dimensions, location, and manner of application of the appliances provided for by sections 4 and 11 of this chapter as designated by the Interstate Commerce Commission shall remain as the standards of equipment to be used on all cars subject to the provisions of this chapter, unless changed by an order of said Interstate Commerce Commission, to be made after full hearing and for good cause shown * * *".

4. The Federal Employers Liability Act (Sections 51 to 59, Chapter 2, Title 45, United States Code) upon which the plaintiff bases his right to recover in this action (R. 2, 3, 12, 16, 77) provides that a common carrier shall be liable to an employee for an injury received while engaged in interstate transportation "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier **or** by reason of any **defect or insufficiency due to its negligence** in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." (Emphasis ours.)

The plaintiff failed to allege and prove that his injury resulted from the negligence of any of the agents or employees of the defendants, or by reason of any defect or insufficiency due to their negligence in the Louisville and Nashville car No. 12670.

The state court erroneously allowed the plaintiff to recover and affirmed the judgment of the Circuit Court although the plaintiff failed to allege and prove that he was injured as the result of any negligence on the part of any agent or employee of the defendants or by reason of

any defect or insufficiency due to their negligence in the car in question.

The suit having been brought under the Federal Employers Liability Law, and plaintiff having failed to allege and prove the conditions upon which liability would attach against these defendants because of negligence of their employees or by reason of any defect or insufficiency in the car, he is not entitled to recover in this case and the state court erroneously interpreted and applied the provisions of the Federal statutes and its judgment should be reversed.

5. The state court erred in refusing to decide this case in accordance with the latest decision of the Federal Court under the Safety Appliance Act in Grand Trunk Ry. v. Holstein, 67 F. (2d) 780, and in following earlier Federal Court decisions even though the court found it difficult to reconcile the Holstein case with earlier decisions cited by the court (R. 340).

The petitioners submit with this petition a brief which they believe supports the reasons relied on by petitioners for the allowance of the writ.

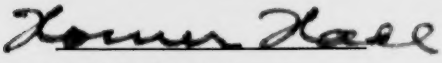
The petitioners also submit with this petition ten copies of the complete transcript of the record and proceedings in this cause in the Supreme Court of Missouri, the original copy of which is duly certified by the Clerk of said Court, and if the writ of certiorari is granted the petitioners will file in this Court the additional number of copies of such transcript of record as required by the rules of this Court.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of Missouri, directing and commanding that Court to certify

and send to this Honorable Court for its review and determination, on a day certain to be named in the writ of certiorari, a full and complete transcript of the record and all proceedings in the cause numbered and entitled on the docket of the Supreme Court of Missouri as Number 37171, Richard F. Wild, Respondent, vs. Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of Wabash Railway Company, Appellants; and your petitioners further pray that upon such review and determination by this Court the said judgment of the Supreme Court of Missouri may be reversed; and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioners will ever pray.

NORMAN B. PITCAIRN and
FRANK C. NICODEMUS, Jr.,
Receivers of Wabash Railway Company, a corporation, Petitioners,

By NAT S. BROWN, and



HOMER HALL,
Counsel for Petitioners.

Supreme Court of the United States

OCTOBER TERM, 1940

No._____

NORMAN B. PITCAIRN AND FRANK C. NICODEMUS, JR., RECEIVERS OF WABASH RAILWAY COMPANY, A CORPORATION, PETITIONERS,

vs.

RICHARD F. WILD

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI AND BRIEF IN SUPPORT THEREOF.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

The Petitioners respectfully present to this Honorable Court the following brief in support of their petition for a writ of certiorari to the Supreme Court of Missouri:

The Opinion of the Court Below.

The opinion of the Supreme Court of Missouri in Division Number One in this cause has not been published in the official reports. The opinion of the Court is contained in the transcript of the record filed with the petition and appears at pages 336 to 348, inclusive. The opinion is unofficially reported as Wild v. Pitcairn et al., in 149 South Western Reporter, Second Series, at pages 800 to 806, inclusive. The opinion was handed down on February 14, 1941 (R. 335), affirming the judgment of the Circuit Court of the City of St. Louis for $20,000 upon condition that the plaintiff would enter a remittitur of $5,000 within ten days, otherwise the judgment of the Circuit Court would be reversed and the cause remanded (R. 336, 348). The judgment of the Supreme Court of Missouri became final and the decision of the highest court of the State of Missouri in which a decision could be had on April 18, 1941, by the overruling of the petitioners' (appellants') motion to transfer the cause to the court en banc under the provisions of Section 4 of the amendment of 1890 to Article 6 of the Constitution of Missouri and Rule 24 of the Supreme Court of Missouri, which Section 4 of the amendment of 1890 and said Rule 24 of the Missouri Supreme Court Rules are set out in the appendix to this brief.

Grounds On Which Jurisdiction Is Invoked.

The jurisdiction of this Court is invoked under the provisions of Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 936, Title 28 United States Code, Sec. 344, and under Rule 38 of the Rules of the Supreme Court of the United States, for the reason that real and substantial Federal questions were and are involved in this cause and were directly presented to and decided by the State Court, in that the plain-

tiff specially set up and claimed a right to recover damages under the Federal Employers' Liability Act and the Federal Safety Appliance Act for injuries received while employed by defendants and his Federal claim was sustained, and defendants specially set up and claimed immunity from liability under said Federal Acts, and their claim was denied.

The Statutes of the United States Involved.

The plaintiff in the State court (R. 2, 3, 12, 16, 77) specially set up and claimed a right under the Federal Employers' Liability Act (Title 45, United States Code, Sections 51 to 59), and the Federal Safety Appliance Act (Title 45, United States Code, Sections 11 to 15), to compensatory damages for injuries received while in the employ of petitioners, and his claim was sustained by the State court (R. 311, 315, 338, 348, 350). The petitioners (defendants) specially claimed immunity from liability under said Acts (R. 4, 5, 22, 112, 113, 310, 311, 325, 326, 351, 356) and their claim was denied by the State court over their exceptions (R. 22, 113, 311, 327, 337, 348, 350, 364).

Cases Sustaining Jurisdiction.

The cases which sustain the jurisdiction of this Court to grant the writ of certiorari and to review the decision of the Supreme Court of Missouri are the following:

Minneapolis, St. Paul & Ste. Marie R. Co. v. Popplar, 237 U. S. 369.
Pryor v. Williams, 254 U. S. 43.
Missouri Pac. Ry. Co. v. Aeby, 275 U. S. 426.
Toledo, St. L. & W. Ry. Co. v. Allen, 276 U. S. 169.
New York Central Ry. Co. v. Ambrose, 280 U. S. 486.
Chesapeake & Ohio Ry. Co. v. Kuhn, 284 U. S. 44.
Chicago & N. W. Ry. Co. v. Bolle, 284 U. S. 74.
Baltimore & Ohio R. Co. v. Berry, 286 U. S. 272.

The decision of the state court was directly upon and directly involved a ruling upon the meaning, scope and applicability of the Act of April 14, 1910, and this Court has jurisdiction and authority to review the ruling and decision of the state courts. St. Louis, Iron Mountain & Southern R. Co. v. McWhirter, 229 U. S. 265, loc. cit. 276.

The Supreme Court of the United States has jurisdiction for the reason that the plaintiff's asserted right to relief depends upon the construction and application of the laws of the United States, the Safety Appliance Act of April 14, 1910, and that Federal claim was not merely colorable but rests upon a reasonable foundation. Smith v. Kansas City Title & Trust Co., 255 U. S. 180, loc. cit. 199; Southern Pacific Co. v. Berkshire, 254 U. S. 415, 416.

In Southern Pacific Co v. Berkshire, 254 U. S. 415, on writ of certiorari to the Court of Civil Appeals of the State of Texas, this Court reversed the judgment of the state court and, at page 416, said:

> "* * * a writ of certiorari was allowed by this Court, upon the ground that an immunity set up under the Federal Employers' Liability Act was involved."

STATEMENT OF THE CASE.

The petitioners have set out in their petition for the writ a full and concise statement of all the facts material to the consideration of the questions here presented, and in the interest of brevity and in order to avoid repetition, beg leave to refer to and rely upon the statement in the petition for the writ at pages 2 to 10.

SPECIFICATIONS OF ERROR AND SUMMARY OF THE ARGUMENT.

1. The Supreme Court of Missouri erred in holding that plaintiff was entitled to recover under the allegations of his petition that his injuries "directly and proximately resulted from defendants' failure to perform their duty under the statutes of United States of America (commonly known as the Federal Safety Appliance Act), and the orders, rules and regulations of the Interstate Commerce Commission made and promulgated pursuant thereto, in such cases made and provided, to have said box car equipped with an efficient handbrake," for the reason that the statute made it unlawful to haul a car not equipped with the required handbrake, but did not make it unlawful for the defendants to fail to equip the Louisville & Nashville Railroad Company's car with an efficient handbrake. The plaintiff was not entitled to recover under the statute for an act or omission which is not made unlawful by the statute.

2. The State court erred in holding that the plaintiff was entitled to recover without proving and requiring the jury to find from the evidence that the handbrake was defective.

3. The State court erred in holding that the plaintiff was entitled to recover under the allegation of his petition that his injuries "directly and proximately resulted from defendants' failure to perform their duty under the statutes * * * and the orders, rules and regulations of the Interstate Commerce Commission * * * to have said box car equipped with an efficient handbrake," for the reason that there was no evidence and the jury was not required to find that the handbrake failed in any particular to comply with the orders, rules and regulations of the Interstate Commerce

Commission. Section 12, Title 45, U. S. Code expressly provides that the number, dimensions, location and manner of application of the appliances as fixed by the Interstate Commerce Commission shall constitute the standard of equipment to be used on all cars subject to the Act and the plaintiff was not entitled to recover on the mere allegation that defendants failed to equip the car as required by the regulations of the Interstate Commerce Commission, without proof that the car was not so equipped and without requiring the jury to find from the evidence that the defendants failed to perform a duty to equip the car as required by the orders, rules and regulations of the Interstate Commerce Commission.

4. The State court erred in holding that the plaintiff was entitled to recover under the Federal Employers' Liability Act (Sections 51 to 59, Chapter 2, Title 45, United States Code), upon which the plaintiff bases his right to recover in this action (R. 2, 3, 12, 16, 77) without proving or the jury being required to find that plaintiff was injured as the result of "the negligence of any of the officers, agents, or employees of such carrier **or** by reason of any **defect or insufficiency due to its negligence in its cars** * * * or other equipment." (Emphasis added.)

The state court erroneously affirmed the judgment of the Circuit Court when the plaintiff failed to allege and prove that he was injured as the result of some negligence on the part of any agent or employee of the defendants or by reason of any defect or insufficiency due to their negligence in the Louisville & Nashville car in question.

The suit having been brought under the Federal Employers' Liability Law, and the plaintiff having failed to allege and prove the conditions which would create liability against these defendants for negligence or by reason

of any defect in the car, he is not entitled to recover and the state court erroneously interpreted and applied the provisions of the Federal statutes, and its judgment should be reversed.

5. The State court was required to decide this case in accordance with the latest decision of the Federal courts under the Safety Appliance Act relating to handbrakes, that is, the decision of the Sixth Circuit Court of Appeals in Grand Trunk Ry. v. Holstein, 67 F. (2d) 780, 781, and the State court erred in refusing to follow that decision and in following prior decisions of the Sixth Circuit Court of Appeals, even though the State court (R. 340) said "It is difficult to reconcile the Holstein case with the cases heretofore cited herein."

ARGUMENT.

I.

The plaintiff is not entitled to a recovery under the sole ground charged, that is, that defendants failed to have the Louisville & Nashville car equipped with an efficient handbrake.

The cause of action which the petition purports to allege is that the petitioners here (defendants) failed to perform a duty required of them by the Safety Appliance Act and the orders, rules and regulations of the Interstate Commerce Commission, that is, that they failed to have the L. & N. car 12670 equipped with an efficient handbrake. The right to recover in this suit is based solely upon that allegation. The plaintiff has no right to recover on any other ground. The answer of the defendants denied the allegation that it was their duty to equip the L. & N. car, which had been delivered to them only about an hour before the accident, which was the specific and the only charge they were called upon to meet.

In Jenkins v. Kurn, ... U. S. . . . . , No. 732, decided May 5, 1941, this Court, in reversing a judgment of the Supreme Court of Missouri, held that the plaintiff (the petitioner) was required to prove the allegations of his complaint on which he sought to recover.

The Court said:

> "To be sure petitioner was required by the allegations of his complaint to prove that he acted promptly and reasonably to awaken the engineer to the danger ahead. * * * petitioner was compelled also to prove that the notice was communicated to the engineer."

In Stark Brothers Nurseries & Orchards Co. v. Stark, 255 U. S. 50, the petitioner sued for infringement of a trade mark registered under the Act of Congress. The Court said:

> "The district found infringement and unfair competition, granted an injunction, and made a decree for an account of profits from March 11, 1914, when the infringement began, limiting the damages, however, to those suffered after August 26, 1916, that being the date when the plaintiff gave the defendant notice of the registration of the trademark. The Circuit Court of Appeals concurred with the District Court as to the facts, but limited the account as well as the damages to the date when notice was given of the registered mark, a few days before the bringing of this suit. * * *."

The Court quoted the provision of the Act requiring giving of notice, and said:

> "The infringement that is sued for is infringement of a registered trademark, not infringement of a trademark. That is the plain meaning of the above words and the necessary scope of this suit * * *. It seems very plain that the plaintiff had a cause of action outside the statute * * *. The statute above gave the right to come into this Court of the United States. Coming in to assert its statutory rights, we will assume in the plaintiff's favor that it could recover for unfair competition that was irreparable from the statutory wrong, but it could not reach back and recover for earlier injuries to rights derived from a different source.
>
> "The plaintiff argues that a notice of March 11, 1914, calling on defendants to discontinue the unfair competition * * * ought to lead to a different result, and the district judge seems to have had a similar notion. But that is to forget the origin and necessary limit of the jurisdiction in this case."

The State Supreme Court in its opinion entirely overlooked the fact that the petition **does not** allege that plaintiff was injured as the result of defendants **hauling** the L. & N. car, but alleges as the **sole** ground of recovery that his injuries "directly and proximately resulted from defendants' **failure** to perform their duty * * * **to have said box car equipped** with an efficient handbrake" (R. 3).

The Supreme Court of Missouri has held in numerous cases that the plaintiff is bound by his pleading and cannot recover on one theory when he has pleaded another, even though he might have been entitled to recover on such theory if he had based his right to recover by such theory.

Davis v. Chicago & E. I. Ry. Co., 338 Mo. 1248, 94 S. W. (2d) 370.

Grieseking v. Litchfield & M. Ry. Co., 339 Mo. 1, 94 S. W. (2d) 375, 377.

The state courts erred in ruling that the plaintiff was entitled to plead one right of action and recover on another. St. Louis, Iron Mountain & Southern R. Co. v. Mc Whirter, 229 U. S. 265, loc. cit. 275; Brinkmeier v. Missouri Pac. Ry. Co. 224 U. S. 268.

II.

The state court erroneously ruled that the plaintiff was entitled to recover although the handbrake was not defective and thereby erroneously interpreted and applied the provisions of the Federal Safety Appliance Act relating to handbrakes, approved April 14, 1910, Sections 11 to 15, inclusive, of Chapter 1 of Title 45, United States Code. Congress provided and required that liability for violation of the Act was conditioned upon proof and

finding that the equipment alleged to have caused the injury was defective at the time.

The state court erred in approving the statement made by counsel for the plaintiff on voir dire examination of the jury, to-wit: "We are not required to prove any defect; we simply prove it didn't operate" (R. 9), and by the giving of plaintiff's instruction number one which authorized the jury to return a verdict for plaintiff without requiring a finding from the evidence that the handbrake equipment was defective (R. 315, 316).

Chapter 1, Title 45, is a combination of a number of different Safety Appliance Acts.

The provisions of the Act of April 14, 1910, are now contained in Sections 11, 12, 13, 14 and 15 of Chapter 1, Title 45, United States Code. Sections 1 to 7, inclusive, of said Chapter 1, Title 45, were found in the Act of March 2, 1893, the first of the Safety Appliance Acts, which required cars to be equipped with power or train brakes, "couplers coupling automatically by impact," and "secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars."

Section 6 of the Act of March 3, 1893, now Section 6 of said Chapter 1, Title 45, provided specifically for the enforcement of the provisions of those sections.

Sections 8, 9 and 10 of said Chapter 1, were Sections 1, 2 and 3 of the Act of March 2, 1903, 32 Stat. 943, and extended the provisions of the Act of March 2, 1893, "relating to train brakes, automatic couplers, grab irons, and the height of draw bars" to all trains and cars, and authorized the Interstate Commerce Commission to increase the percentage of cars in a train required to be equipped with train brakes. Section 10 of Chapter 1, Title 45, expressly provided that nothing in Sections 8

and 9 of this chapter should relieve any common carrier or the Interstate Commerce Commission from any of the duties or liabilities set out in the preceding sections of that chapter.

Sections 11, 12, 13, 14 and 15 of said Chapter 1, Title 45, contain the provisions of the Act of April 14, 1910, relating to and requiring sill steps, handbrakes, ladders and running boards.

Section 12 of Chapter 1 (Section 3 of the Act of April 14, 1910) provides that "The number, dimensions, location, and manner of application of the appliances provided for by Sections 4 (requiring grab irons or handholds) and 11 (requiring sill steps, handbrakes, ladders and running boards) of this chapter as designated by the Interstate Commerce Commission shall remain as the standards of equipment to be used on all cars subject to the provisions of this chapter, unless changed by an order of said Interstate Commerce Commission, to be made after full hearing and for good cause shown; and failure to comply with any such requirement of the Interstate Commerce Commission shall be subject to a like penalty as failure to comply with any requirement of this chapter. * * *." This Section 12 then specifically authorizes the Interstate Commerce Commission to change and prescribe the height of drawbars.

Section 13 of said Chapter 1, Title 45, provides:

> "Any common carrier subject to this chapter using, hauling or permitting to be used or hauled on its line, any car subject to the requirements of this chapter not equipped as provided in this chapter, shall be liable to a penalty of $100.00 for each and every such violation, to be recovered as provided in section 6 of this chapter: Provided, That where any car shall have been properly equipped, as provided in this chapter, and such equipment shall have become **defective** or

insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place where such equipment was first discovered to be **defective** or insecure to the nearest available point where such car can be repaired, without liability for the penalties imposed by this section or section 6 of this chapter, if such movement is necessary to make such repairs and such repairs cannot be made except at such repair point; and such movement or hauling of such car shall be at the sole risk of the carrier, and nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employee caused to such employee by reason of or in connection with the movement or hauling of such car with equipment which is **defective** or insecure or which is not maintained in accordance with the requirements of this chapter; and nothing in this proviso shall be construed to permit the hauling of **defective** cars by means of chains instead of drawbars, in revenue trains or in association with other cars that are commercially used, unless such **defective** cars contain livestock or 'perishable' freight. (Apr. 14, 1910, c. 160, Sec. 4, 36 Stat. 299.)"

Section 14 of Chapter 1, Title 45, is as follows:

"Except that, within the limits specified in the **preceding section** of this chapter **the movement of a car with defective or insecure equipment** may be made without incurring the penalty provided by the statutes, but shall in all other respects be unlawful, nothing in sections 11, 12, and 13 of this chapter shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any United States attorney from any of the provisions, powers, duties, liabilities, or requirements heretofore set out in this chapter; and, except as aforesaid, all of such provisions, powers, duties, requirements, and liabilities shall apply." (Emphasis added.)

It is the contention and belief of these petitioners that the plain language of the Statute requires the holding, and the clear intention of the Congress is disclosed, that liability for injury to an employee does not arise unless and until it is shown that the appliance was in fact defective.

In Minnesota ex rel. Pearson v. Probate Court, 309 U. S. 270, loc. cit. 275, this Court said:

> "As we have often said, the legislature is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest. If the law 'presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied'." (Citing cases.)

In White v. United States, 305 U. S. 281, the Court, at page 292, said:

> "It is the function and duty of courts to resolve doubts. We know of no reason why that function should be abdicated in a tax suit more than in any other where the rights of suitors turn on the construction of a statute, and it is our duty to decide what that construction fairly should be."

In McDonald v. Thompson, 305 U. S. 263, this Court rejected the definition of a term in the Federal Motor Carrier Act contended for by one of the parties, and said:

> "That would be contrary to the rule that all words of a statute are to be taken into account and given effect if that can be done consistently with the plainly disclosed legislative intent. D. Ginsberg & Sons v. Papkin, 285 U. S. 204, 208; Ex parte Public Nat. Bank, 278 U. S. 101, 104. There is nothing to justify rejection of these qualifying words."

In United States v. Dickerson, 310 U. S. 554, this Court, at page 561, said:

> "* * * The meaning to be ascribed to an Act of Congress can only be derived from a considered weighing of every relevant aid to construction."

In Lewis-Sutherland Statutory Construction, vol. 2, paragraph 390, it is said:

> "As a general rule, the words of a statute are to be taken in their ordinary sense, unless it plainly appears from the context or otherwise that they were used in a different sense * * *."

We called attention to the fact that the first Federal Safety Appliance Act was the Act of March 2, 1893 (now 45 U. S. Code, sec. 1-7), requiring that cars be equipped with automatic couplers. That provision (now Sec. 2, 45 U. S. C.) has probably been the basis of more suits and decisions than any other portion of the Safety Appliance Acts. It is very different from the Act of April 14, 1910 (Sec. 11, 45 U. S. C.), which for the first time, 17 years after the Automatic Coupler Law was enacted, required carriers to have cars equipped with "efficient handbrakes."

The automatic coupler law specifically states what is required to comply with the law, and just what omission on the part of a carrier constitutes a failure to comply with the law. It provides that it shall be unlawful to use cars "not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." That statute states what is required so plainly that there was no room nor necessity for an interpretation of the statute and the courts have held that if a car was not equipped with couplers, which coupled automatically by impact, the

law was violated and the carrier was liable for an injury resulting from the use of a car which was not so equipped. The trend of the decisions under the Federal Safety Appliance Acts has had its origin in the decisions applying the unrestricted requirements of the Automatic Coupler Law. In view of this unquestionable fact, it is important we believe that the handbrake Act (45 U. S. C. secs. 11-15) be examined and interpreted in this case in the light of its provisions and the accepted rule of statutory construction.

In Section 4 of the Act of April 14, 1910, Congress used the word "defective" **five times** in stating the conditions under which a carrier would or would not be liable for using a car which was not equipped with the kind of a handbrake which Congress intended when in Section 2 of the same Act it said that cars must be equipped with efficient handbrakes. The context as contained in Sections 4 and 5 of the Act (45 U. S. C. Secs. 13, 14) certainly shows that when the Congress required that cars be equipped with efficient handbrakes, it only meant handbrakes that were **not defective or insecure.**

Petitioners therefore believe that what the courts have said in automatic coupler cases about handbrakes should be treated as obiter dictum, and that the decisions in handbrake cases which are based upon the decisions in automatic coupler cases, should be disregarded. Petitioners believe that this question now squarely presented, should be decided by this Court in this case, whether the plaintiff is entitled to recover, when he failed to allege and prove and the jury was not required to find that the handbrake was defective on this L. & N. car, which had been in defendants' possession less than an hour.

The fact that the courts have heretofore failed to properly interpret and apply the plain provisions of the Safety Appliance Act relating to handbrakes and have failed to

distinguish between that Act and the Automatic Coupler Law is clearly presented in this case and petitioners believe that this Court should review the decision of the State court in this case and now make that distinction and hold that the decisions in the Automatic Coupler cases are not applicable to this case.

III.

The plaintiff based his right to recover on alleged failure of defendants to perform their duty under the orders, rules and regulations of the Interstate Commerce Commission, but failed to prove that the brake equipment did not comply with the standards prescribed by the Commission and for that reason he is not entitled to recover in this suit.

The plaintiff is bound by the allegation of his petition that his injury proximately resulted from failure of the defendants to comply with the orders, rules and regulations of the Interstate Commerce Commission in that defendants failed to have the L. & N. car equipped with a handbrake conforming to the specifications required by the Commission.

The plaintiff alleged in his petition that the defendants failed to comply with the orders, rules and regulations of the Commission, and he must prove before he can recover the particulars in which the defendants failed to comply with such orders, rules and regulations and having failed to so prove this allegation he is not entitled to recover. The courts will assume that carriers have complied with the requirements of the law and of the orders, rules and regulations of the Interstate Commerce Commission.

IV.

The State court erred in holding that although plaintiff based his suit on the Federal Employers' Liability Act, he was entitled to have the judgment affirmed, even though he failed to allege or prove and the jury was not required to find that his injury resulted from negligence of the petitioners' agents or employees or from a defect in the Louisville & Nashville car, due to their negligence.

The plaintiff bases his right to recover in this action on the Federal Employers' Liability Act (R. 2, 3, 12, 16, 77). That Act (Sec. 51, Title 45, United States Code) makes a common carrier liable to an employee who is injured while engaged in interstate transportation for an injury "resulting in whole or in part from the **negligence** of any of the officers, agents or employees of such carrier **or** by reason of any **defect or insufficiency, due to its negligence** in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." (Emphasis ours.)

There is nothing in the Act which in any way changes or modifies the provision, limitation or restriction that the carrier is liable **only** in case there is **negligence.** There can be no recovery if the employee fails to allege and prove that his injury resulted "in whole or in part from the **negligence** of any of the officers, agents or employees of such carrier, or by reason of any **defect or insufficiency due to its negligence,** in its cars * * *."

The Federal Employers' Liability Act gave the plaintiff as an employee of the petitioners a right of action for an injury resulting from the **negligence** of any of the officers, agents, or employees of the receivers, or for an injury resulting from **any defect or insufficiency,** due to **their negligence,** in **their** cars.

The Act of April 14, 1910, is the only Act of Congress dealing with the subject of handbrakes and the Act

should be considered and applied as an entirety and the intention of Congress should be viewed and determined from the Act as a whole. When so viewed, and considered, it is unmistakably apparent that Congress did not intend to make a carrier liable except when the plaintiff alleged and proved and the jury under the instructions found that the handbrake was defective. In this case the plaintiff not only failed to allege in his petition and prove by the evidence that the handbrake was defective, but expressly claimed and the Court below specifically ruled that it was not necessary for plaintiff to allege or prove that there was any defect in the handbrake, and that he was only required to prove that it did not operate (R. 9, 315).

The fact that the Congress uses the term "defect" or "defective" five times in Section 4 and once in Section 5 of the Act in describing the conditions and circumstances under which a carrier would be held to have failed to comply with the requirements of the Act, shows that a carrier would not be liable except when it was alleged and proved that the handbrake was defective.

The Act of April 14, 1910, should be considered in its entirety, and when so considered, it shows that the Congress intended that the defendants below, the petitioners here, should not be held liable for failure of the owner of the car, Louisville & Nashville Railroad Company, to equip the car with a handbrake as specified in the Act. The petition of the plaintiff alleges and bases his right to recover only upon the failure of the defendants below, the petitioners here, to **equip** the car with a handbrake as required by the Act and the rules and orders of the Interstate Commerce Commission.

In New York Central R. Co. v. Ambrose, 280 U. S. 486, which was an action under the Federal Employers' Lia-

bility Act, as is the case at bar, this Court, at page 489, said:

> "We are of opinion that there must be a reversal because the evidence fails to establish negligence on the part of the railroad company."

In the same case, at the same page, the Court said:

> "In any view of the matter, the respondent (plaintiff), upon whom lay the burden, completely failed to prove that the accident was proximately due to the negligence of the company. It follows that the verdict rests only upon speculation and conjecture, and cannot be allowed to stand (citing case).
>
> "The utmost that can be said is that the accident may have resulted from any one of several causes, for some of which the company was responsible, and for some of which it was not. This is not enough. See Patton v. Texas & P. R. Co., 179 U. S. 658, where, at page 663, this Court said:
>
> " 'The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence. * * *'."

In Jamison v. Encarnacion, 281 U. S. 635, this Court, at page 640, said:

> "The Federal Employers' Liability Act does not create liability without fault."

The plaintiff could not maintain this action for damages except under the provisions of the Federal Employers' Liability Act, and it is upon that Act that the plaintiff bases his right to recover in this action (R. 2, 3, 12, 16, 77). That Act provides that a common carrier shall be liable to an employee for an injury received

while engaged in interstate transportation "resulting in whole or in part from the **negligence** of any of the officers, agents, or employees of such carrier **or by reason of any defect or insufficiency due to its negligence** in its cars, * * *" (emphasis ours).

The plaintiff failed to allege and prove that his injury resulted from the negligence of any of the agents or employees of the defendants, or by reason of any defect or insufficiency due to their negligence in the Louisville and Nashville car No. 12670.

The State Court erroneously allowed the plaintiff to recover and affirmed the judgment of the Circuit Court although the plaintiff failed to allege and prove that he was injured as the result of any negligence on the part of any agent or employee of the defendants or by reason of any defect or insufficiency due to their negligence in the car in question.

The suit being under the Federal Employers' Liability Law, and the plaintiff having failed to allege and prove that he was injured as the result of negligence of the agents of these defendants or by reason of any defect or insufficiency in the car, he is not entitled to recover in this case and the state court erroneously disregarded and failed to apply the provisions of the Federal statute on which the action is based and the judgment should be reviewed by this Court on this ground.

V.

The state court erred in holding that it should disregard the latest ruling of the federal court.

It was the duty of the state courts to follow and apply the latest ruling and decision of the federal courts in construing and applying the federal law, the Federal

Safety Appliance Act of April 14, 1910. The state courts had no right to disregard the latest ruling of the federal court in Grand Trunk R. Co. v. Holstein, 61 F. (2d) 780, on the theory or assumption that the court of appeals in that case did not believe the plaintiff's testimony on the trial because he had made a different statement before the trial.

In Weaver v. Mobile & Ohio R. Co., 120 S. W. (2d) 1105, the Supreme Court of Missouri en banc clearly recognizes the rule that the decisions of the federal courts should be followed, and at page 1109 said:

> "As this action is under the Federal Employers' Liability Act, the test announced by the decisions of our federal courts in ruling the sufficiency of the evidence on a motion for a directed verdict is to be followed."

The right to recover depends upon the Act of Congress, and the principles administered in the federal courts. Spokane & I. E. R. Co. v. Campbell, 241 U. S. 497, 509; Texas & Pac. R. Co. v. Rigsby, 241 U. S. 33, 41; Chesapeake & O. R. Co. v. Kelly, 241 U. S. 485, loc. cit. 491.

The Supreme Court of Missouri seems to base its decision largely upon the case of Henry v. Cleveland, C., C. & St. L. Ry. Co., 332 Mo. 1072 (61 S. W. [2d] 340). The opinion in that case, quoted from the petition in the case which alleged that car on which the employee was working "was not equipped with a secure and efficient handbrake," but it did not charge the carrier in that case with liability on the ground that it did not equip the car with an efficient handbrake, and did not base a right to recover on that ground, as the plaintiff Wild has done in this case. In that case the plaintiff alleged and based the right to recover on the charge that defendant hauled a car on its lines

which did not comply with the statute in that the handbrake was so defective, insecure and inefficient that "either the handbrake chain broke," or "was so insecure and inefficient * * *that it became disconnected in such manner as to cause the deceased to fall * * * when he attempted to use same, * * *."

The Court in that case quoted the provision of the Safety Appliance Act under which that suit was brought that "it shall be unlawful for any common carrier subject to the provisions of this chapter to haul, or permit to be hauled or used on its line any car" not equipped as provided in the Act.

The Court then said that Act imposed the duty upon the carrier to equip **its** cars with efficient handbrakes. The Court did not say in that case or in any case that it is the duty of a carrier **to equip the car of another carrier** with efficient handbrake, or that an employee might recover from his employer on the ground that it had not equipped the car of another carrier with such handbrake, as the plaintiff Wild alleged and was allowed to recover in this case.

In the Henry case, relied upon by the Missouri Supreme Court in this case, the Court cites several federal cases in support of its holding. In Philadelphia & R. Railroad Co. v. Eisenhart (C. C. A.), 280 F. 271, 276, the plaintiff was injured by reason of a defective coupler. The Automatic Coupler Act of March 2, 1893, required that cars must be equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of cars. The Circuit Court of Appeals in that case, at page 276, said:

> "The defendant might have asked in the terms of the point, for an instruction to the jury that if they

> believed under all the evidence that the couplers 'were in proper condition of **construction and repair,** capable of coupling automatically by impact in the manner required by the Safety Appliance Act, then (they) might find that the defendant had performed its duty'. This would have been an instruction on the absolute duty of the carrier to conform to the Act." (Emphasis added.)

The Court in that case said the Act "imposes an absolute duty upon the carrier to keep **its couplers** in a condition of **construction and repair** to meet the safety requirements of its provisions." (Emphasis added.)

In that case the Circuit Court of Appeals (page 275), said:

> "As the whole controversy had revolved around the question whether the couplers at the place where they parted were **defective,** we think the charge was proper if warranted by the evidence."

The question submitted was whether the cause of the injury was the **"defective coupling."** The Court said one witness testified that there was lost motion in the coupler parts which explained their action. The Court then said: "This was testimony of a **defect.** We think it was admissible." (Emphasis added.) The Court also said that "the verdict should be sustained on the inference of the defendant's **negligence** to be drawn from the mere opening of the couplers." (Emphasis added.)

In Lehigh Valley R. Co. v. Howell, 6 F. (2d) 784, the Circuit Court of Appeals quoted the provision of the Safety Appliance Act making it "unlawful for any common carrier * * * to haul or permit to be hauled or used * * * any car * * * not equipped * * * with efficient handbrake."

The Court said this "obligation was absolute and mandatory," and then said: "That the brake was **defective** is abundantly established, if not admitted" (emphasis added). The Court, referring to the defective condition of the brake, fully established by the evidence, said, 'when it failed **because of its defect,** it proved to be inefficient" (emphasis added).

The Court referred to the case of Davis v. Wolfe, 263 U. S. 239, in which the plaintiff's injury was caused by a grab iron which "was **defective,**" and quoted from that decision in which this Court said, "there was substantial evidence tending to show that the **defective condition** of the grab iron * * * was a proximate cause of the accident, * * * " (emphasis added).

The Circuit Court of Appeals then referred to a prior decision "where the plaintiff was injured by a **defective** coupling."

In Texas & Pac. R. Co. v. Rigsby, 241 U. S. 33, loc. cit. 40, the Court said:

> "Plaintiff's injury was directly attributable to a **defect** in an appliance, which, by the 1910 amendment, was required to be secure, and **the Act must therefore be deemed to create a liability** * * * " (emphasis added).

In Spokane & I. E. R. Co. v. Campbell, 241 U. S. 497, cited in the Henry case, the Court (page 504) said that

> "in the light of the issues, the evidence, and the charge, it is evident, we repeat, that the jury must have found that the **defective** air brakes were a proximate cause of the collision."

The Court, at page 505, also said:

> "It is, of course, settled, that **if** the equipment was in fact **defective** or out of repair, the question whether this was attributable to the company's negligence is immaterial" (emphasis added).

In the same case this Court also said:

> "* * * The air-brake equipment was wrecked in the collision, so that there was no explanation of the cause of its failure to operate properly; but it was a reasonable inference that there was some **defect or want of repair** in the valves or packing."

In San Antonio & A. P. R. Co. v. Wagner, 241 U. S. 476, l. c. 482, this Court said:

> "There was sufficient evidence to warrant the jury in finding that the coupler upon the box car or that upon the engine, or both, were in **bad repair,** and that for this reason they did not measure up to the standard prescribed by the Act of March 2, 1893, for such equipment" (emphasis added).

In the case of Didinger v. Pennsylvania R. Co., 39 F. (2d) 798, which the State Court relies upon, the Circuit Court of Appeals states the very pertinent proposition, which the petitioners believe authorizes a review of the judgment in this case. The Court in that case said it was "distinguishable from Burnett v. Pennsylvania R. Co., 33 F. (2d) 576 (C. C. A. 6), for there the happening of the accident **was not, as here, consistent only with the hypothesis of the existence of some defect. There the proofs were 'at least equally consistent with the existence of some other effective cause' than defect or insufficiency.**" (Emphasis ours.)

In this case, as in the Burnett case, the happening of

the accident was not consistent only with the hypothesis of some defect, for in the case at bar, as in the Burnett case, the **proofs were** at least equally consistent with the existence of some other effective cause than defect or inefficiency. That fact cannot be fairly contradicted or counteracted for the reason plaintiff proved that a bolt or nut or stone getting between the brake shoe and the rim of a car wheel, and that flat places on a wheel, would cause the brake to jerk and vibrate (R. 306, 308, 310).

The petitioners believe that the Supreme Court of Missouri erred in refusing to follow the ruling in latest decisions of the Federal Court, especially as stated in the Holstein case and in the Didinger case, and that on this ground this Court should grant the writ and review the judgment and decision of the State Court.

CONCLUSION.

The petitioners believe that the decision of the Supreme Court of Missouri is erroneous in each and all of the particulars stated in the Specifications of Error and in the petition for certiorari, that the decision should be reviewed by this Court and that in the exercise of sound judicial discretion the writ of certiorari to review the judgment of the State Court should be issued.

Respectfully submitted,

NAT S. BROWN,
HOMER HALL,
Counsel for Petitioners.

APPENDIX TO BRIEF.

Federal Employers' Liability Act, Title 45, Chapter 2.

Sec. 51

"Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence. Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment. (Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65.)"

Sec. 53

"Contributory negligence; diminution of damages. In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to

the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. (Apr. 22, 1908, c. 149, Sec. 3, 35 Stat. 66.)"

Sec. 54

"**Assumption of risks of employment.** In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. (Apr. 22, 1908, c. 149, Sec. 4, 35 Stat. 66.)"

Sec. 58

"**Duty or liability of common carriers and rights of employees under other Acts not impaired.** Nothing in this chapter shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress. (Apr. 22, 1908, c. 149, Sec. 8, 35 Stat. 66.)"

Safety Appliance Act, Title 45, U. S. Code, Chapter 1.

Sec. 11

"**Safety appliances required for each car; when hand brakes may be omitted.** It shall be unlawful for any common carrier subject to the provisions of this chapter to haul, or permit to be hauled or used on its line, any car subject to the provisions of this chapter not equipped with

appliances herein provided for, to-wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the tops of such ladders; Provided, That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose (Apr. 14, 1910, c. 160, Sec. 2, 36 Stat. 298.)"

Sec. 12

"**Safety appliances, as designated by commission, to be standards of equipment; modification of standard height of drawbars.** The number, dimensions, location, and manner of application of the appliances provided for by sections 4 and 11 of this chapter as designated by the Interstate Commerce Commission shall remain as the standards of equipment to be used on all cars subject to the provisions of this chapter, unless changed by an order of said Interstate Commerce Commission, to be made after full hearing and for good cause shown; and failure to comply with any such requirement of the Interstate Commerce Commission shall be subject to a like penalty as failure to comply with any requirement of this chapter. Said commission is hereby given authority, after hearing, to modify or change, and to prescribe the standard height of drawbars and to fix the time within which such modification or change shall become effective and obligatory, and prior to the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard now fixed or the standard so prescribed, and after the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not com-

ply with the standard so prescribed by the commission. (Apr. 14, 1910, c. 160, sec. 3, 36 Stat. 298.)"

Sec. 13

"Penalty for using car not equipped as provided; hauling car for repairs where equipment becomes defective; liability for death or injury of employee; use of chains instead of drawbars. Any common carrier subject to this chapter using, hauling or permitting to be used or hauled on its line, any car subject to the requirements of this chapter not equipped as provided in this chapter, shall be liable to a penalty of $100 for each and every such violation, to be recovered as provided in section 6 of this chapter: Provided, That where any car shall have been properly equipped, as provided in this chapter, and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired, without liability for the penalties imposed by this section or section 6 of this chapter, if such movement is necessary to make such repairs and such repairs cannot be made except at such repair point; and such movement or hauling of such car shall be at the sole risk of the carrier, and nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employee caused to such employee by reason of or in connection with the movement or hauling of such car with equipment which is defective or insecure or which is not maintained in accordance with the requirements of this chapter; and nothing in this proviso shall be construed to permit the hauling of defective cars by means of chains instead of drawbars, in revenue trains or in association with other cars that are commercially used, unless

such defective cars contain livestock or 'perishable' freight. (Apr. 14, 1910, c. 160, Sec. 4, 36 Stat. 299.)"

Sec. 14

"Liability for using car with defective equipment, except as specified. Except that, within the limits specified in the preceding section of this chapter the movement of a car with defective or insecure equipment may be made without incurring the penalty provided by the statutes, but shall in all other respects be unlawful, nothing in sections 11, 12, and 13 of this chapter shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any United States attorney from any of the provisions, powers, duties, liabilities, or requirements heretofore set out in this chapter; and, except as aforesaid, all of such provisions, powers, duties, requirements, and liabilities shall apply. (Apr. 14, 1910, c. 160, Sec. 5, 36 Stat. 299.)"

Sec. 15

"Enforcement by commission. It shall be the duty of the Interstate Commerce Commission to enforce the provisions of this chapter as to equipment of each car with safety appliances and all powers heretofore granted to said commission are hereby extended to it for the purpose of such enforcement. (Apr. 14, 1910, c. 160, Sec. 6, 36 Stat. 299.)"

Sec. 16

"Applications of provisions to common carriers and vehicles subject to 'Safety Appliance Acts'. The provisions of sections 11, 12, 13, 14 and 15, as to the equipment of cars with the designated safety appliances apply to every common carrier and every vehicle subject to what are commonly known as the 'Safety Appliance Acts' set out in the first nine sections of this chapter. (Apr. 14, 1910, c. 160, Sec. 1, 36 Stat. 298.)"

Missouri Supreme Court Rules.

Rule 21. Motions for Rehearing. Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision to which the attention of the court was not called through the neglect or inadvertence of counsel, and the question so submitted by counsel and overlooked by the court, or the statute with which the decision conflicts, or the controlling decision to which the attention of the court was not called, as the case may be, must be distinctly and particularly set forth in the motion, otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be delivered, and notice of the filing thereof must be served on the opposite counsel. After a cause has been once reheard and the motion for rehearing overruled either in division or En Banc no further motion for rehearing or motion to set aside the order overruling the motion for rehearing, by the same party, will be entertained by the court or filed by the clerk.

Rule 24. Transfers to Court En Banc. A motion to transfer a cause under the provisions of the Constitution from either division to Court En Banc must be filed within ten days after the final disposition of the cause by the division, and notice of such motion shall be given as provided in Rule 23.

Provisions of Missouri Constitution.

Section 1 of the Amendment of 1890 to Article 6 of the Constitution of Missouri, which increased the number of the judges from five to seven, created the two divisions, and defines the jurisdiction of each division, contains the following:

> "**Provided,** That a cause therein may be **transferred to the court as provided in section four of this amendment.** The division of business of which said divisions have concurrent jurisdiction shall be made as the Supreme Court may determine. A majority of the judges of a division shall constitute a quorum thereof, and all orders, judgments and decrees of either division, as to causes and matters pending before it, shall have the force and effect of those of the court."

Section 4 of the amendment of 1890, mentioned in Section 1 of the Amendment just quoted, is as follows:

> "Sec. 4. **Case transferred to court in banc, when.**— When the judges of a division are equally divided in opinion in a cause, or **when a judge of a division dissents** from the opinion therein, or **when a federal question is involved, the cause, on the application of the losing party, shall be transferred to the court** for its decision; or when a division in which a cause is pending shall so order, **the cause shall be transferred** to the court for its decision." (Emphasis ours.)

22

SEP 6

SUPREME COURT OF THE UNITED STATES

October Term, 1941.

No. 164.

NORMAN B. PITCAIRN and FRANK C. NICODEMUS, JR., Receivers of WABASH RAILWAY COMPANY, a Corporation,

Petitioners,

vs.

RICHARD F. WILD,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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SUPREME COURT OF THE UNITED STATES

October Term, 1941.

No. 164.

NORMAN B. PITCAIRN and FRANK C. NICODEMUS, JR., Receivers of WABASH RAILWAY COMPANY, a Corporation,

Petitioners,

vs.

RICHARD F. WILD,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

Respondent considers the petitioners' statement of this case to be inaccurate, unduly prolix, and biased and partisan, so as to require that respondent make a statement of his own.

THE FACTS.

On February 18, 1938, the respondent, Richard F. Wild, was a switchman of over fifteen years experience, in the employ of petitioners, who were the Receivers for the Wabash Railway Company and operating its properties as common carriers by railroad engaged in interstate commerce and transportation (R. 4-5), and working in petitioners' Luther avenue yard at St. Louis, Missouri (R. 22). At about 6:40 p. m. on that day respondent Wild, while engaged in the course and scope of his aforesaid employment there, was working upon a certain box car, designated as L. & N. 12670, and being the property of the Louisville & Nashville Railroad Company, which was being moved by one of petitioners' switching crews over, along and into a specifically designated track in petitioners' yard for the purpose of being put into a train being made up on that track and destined for Des Moines, Iowa (R. 22-23). This car contained an interstate load of pipe originating at Paladiga, Alabama, and destined for Minneapolis, Minnesota (R. 120, 204, 207); it had been hauled over various railroads from its point of origin to St. Louis, Missouri (R. 120, 203, 213-216); it had been delivered by a connecting carrier to petitioners at about 6 p. m. on that day (R. 213-215, 216-218); and it was to be taken in petitioners' aforesaid Des Moines train to Albia, Iowa, where it would be transferred to another connecting carrier for further transportation toward its ultimate destination (R. 23, 215-216).

The movement being made was a southward movement over and into petitioners' track No. 1 (R. 85, 271, 272), and the car L. & N. 12670 was the southernmost of a cut of cars being shoved into that track by an engine attached to the north end of the cut of cars (R. 23, 24, 85). Respondent's duty required that he attend to the setting of the hand brake upon this car (R. 24, 103), and, accord-

ingly, he got upon the north end of the east side of the slowly moving car (R. 24, 25, 26) and climbed up the ladder there to get to the brake platform and brake wheel, which were located on the north end of the car (R. 24-25, 85).

The brake platform and brake mechanism on the north end of this box car L. & N. 12670 was typical of the old staff-and-wheel type hand brake in common use on railroads for many years, and which type of brake is clearly illustrated by the photographs offered in evidence as Defendants' Exhibits 10 (R. 125), 11 (R. 126) and 12 (R. 164). Essentially, this type of brake consisted of a vertical brake staff, which passed through a horizontal wooden brake platform located on the end of the car some two or three feet below the car roof, with a horizontal brake wheel attached to the upper end of the staff, with a brake chain attached to the lower end of the staff, and with a ratchet wheel and pawl arrangement attached on the upper side of the brake platform—the purpose of the ratchet wheel and pawl being to hold the brake set in the various degrees of tension in a tightening of it, and to prevent the brake from reversing or releasing when being set (R. 25-28, 85-86).

When respondent got onto the car he climbed to the brake platform (R. 25), which placed him facing toward the south (R. 26). He then placed his left foot against the outer edge of the pawl or "dog" to engage it with the teeth of the ratchet wheel (R. 26, 86), and turned the wheel in a clockwise direction to tighten the brake (R. 26, 87). He continued to so turn the brake wheel until he had tension on the brake (R. 26, 29, 86, 87), and, as he did so, he kept his left foot against the pawl and the pawl meshed in the teeth of the ratchet wheel (R. 27, 29, 86), and he heard the pawl or dog "clicking" in the teeth of the wheel as it turned (R. 27, 87, 108)—which was the

usual, customary and proper way to set such a brake (R. 29, 79). After respondent had tension on the brake, and while he still had his foot against the pawl and without any change, slipping or other movement of his body (R. 30, 32, 108), the pawl or "dog" failed to hold the brake in position and to keep it from reversing (R. 108) and the brake suddenly reversed itself, and the wheel spun in the opposite direction to which he had been turning it, and threw him off the car to the ground causing him to be seriously injured (R. 26, 29, 86-87, 101).

In applying this brake on this occasion, respondent Wild used every device known to him to properly apply it and to keep it from reversing (R. 78, 79), and, in his opinion, the pawl or "dog" either slipped above or below the wheel of the ratchet (R. 108). The reversing of a brake, under the circumstances described, is an abnormal thing (R. 29-30), and, if a brake is an efficient one, it will not, under such circumstances, reverse as this one did (R. 30-32).

Before the injury to respondent the trains containing this car, L. & N. 12670, had been inspected at Nashville, Tennessee (R. 120-123, 146-147, 164-166, 199-200, 201-203), at East St. Louis, Illinois (R. 203-212), and at defendants' Luther Avenue yard in St. Louis, Missouri (R. 213-220, 241-242). This particular car, L. & N. 12670, was also inspected some thirty minutes after the injury to respondent Wild (R. 220-226, 244-245, 253-254, 257-259), and again the following morning (R. 259-260, 264, 265-266, 269). All of these inspections were made while the car was standing still (R. 160, 225, 235, 251); all of the inspections made prior to respondent Wild's injury were purely visual and without any test being made of the brake (R. 141, 145, 149, 203, 210-211, 229, 242, 248-249), and those inspections made after the injury included such tests of setting and releasing the brake as might be made on a standing car (R. 224-

225, 245). These tests failed to disclose any physical defect in the brake, or any improper operation in the setting or releasing of the brake while the car was standing. The efficiency of a hand brake on a car cannot be tested with the car motionless (R. 172, 308-309).

THE PROCEEDINGS BELOW.

On August 15, 1938, respondent Wild, as plaintiff, brought this action against petitioners here, as defendants, in the Circuit Court of the City of St. Louis, Missouri, to recover damages on account of his aforesaid injury (R. 1). His petition (R. 2-4), or complaint, after alleging the facts essential to invoke the application of the Federal Employers' Liability Act (45 U. S. C. A., §§ 51-59), grounded a recovery upon a violation of the Supplement of 1910 to the Federal Safety Appliance Act (Act of Apr. 14, 1910, c. 160, 36 Stat. 298, 45 U. S. C. A., §§ 11-16) and the order of the Interstate Commerce Commission entered on March 13, 1911, pursuant to the authority contained in Section 12 of the Safety Appliance Act (Act of Apr. 14, 1910, c. 160, sec. 3, 36 Stat. 298, 45 U. S. C. A., § 12) relating to the equipment of box cars with "efficient hand brakes." The petition, in respect to the violation of the Safety Appliance Act and the aforesaid order of the Interstate Commerce Commission, alleged (R. 2-3):

> "* * * that on * * * the 18th day of February, 1938, he [plaintiff] was a servant and employee of defendants, working as a switchman in, upon and about defendants' cars, trains and locomotives on the lines of defendants, and * * * while plaintiff, pursuant to his aforesaid employment by defendants, was working as such servant and employee of defendants in, upon and about trains and cars which were then and there being hauled, used, moved, transported and classified on defendants' lines in defendants' Luther Avenue Yard in the City of St. Louis, Missouri, * * *

> plaintiff was upon a box car and did attempt to operate a hand brake thereon; that said hand brake was inefficient and did suddenly, violently, and unexpectedly spin, turn, twist, revolve, vibrate, chatter, directly thereby causing plaintiff to be thrown from said box car to the ground and to sustain the injuries hereinafter more particularly alleged, all of which directly and proximately resulted from defendants' failure to perform their duty, under the statutes of the United States of America (commonly known as the Federal Safety Appliance Act), and the orders, rules and regulations of the Interstate Commerce Commission of the United States made and promulgated pursuant thereto, in such cases made and provided, to have said box car equipped with an efficient hand brake."

The petition then went on to allege that "as a direct and proximate result of defendants' aforesaid failure to comply with the aforesaid laws of the United States of America and the aforesaid orders, rules and regulations of said Interstate Commerce Commission," plaintiff received the injuries detailed in the petition (R. 3).

The answer filed by the petitioners here, as defendants in the trial court, admitted that they were the Receivers of the Wabash Railway Company, in charge of and operating its properties and trains as common carriers by railroad engaged in interstate commerce and transportation, and denied every other allegation of the petition (R. 4-5).

At the trial the jury was instructed, at the instance of both parties (R. 315-316, 317, 318), that, as a condition for a verdict in favor of plaintiff, it was necessary for them to find that the hand brake upon car L. & N. 12670 was "inefficient," and that respondent Wild (plaintiff) was injured as a direct and proximate result of the "inefficiency" of the hand brake. None of the instructions given, and

none of the instructions refused (R. 320), dealt with the hand brake being "defective," as distinguished from "inefficient." The jury found for respondent Wild, plaintiff below (R. 1b, 5, 324), and the judgment entered in his favor upon the verdict (R. 1b, 5) was affirmed by the Supreme Court of Missouri, Division No. 1 thereof, after plaintiff had entered an enforced remittitur ordered by said Supreme Court of Missouri (R. 335, 349-350).

The opinion of the Supreme Court of Missouri is not yet officially reported, but it is reported as Wild v. Pitcairn (Mo. Sup.), 149 S. W. 2d 800, and appears in full in the record herein (R. 336-348).

Following the overruling of their motion for a rehearing by the Supreme Court of Missouri (R. 350, 364) and their motion to transfer the cause to the Supreme Court of Missouri en banc (R. 364, 373), petitioners (defendants) have applied here for certiorari to review the judgment of the Supreme Court of Missouri.

SUMMARY OF ARGUMENT.

I.

There was no error in the ruling and decision of the Supreme Court of Missouri to the effect that the plaintiff's petition (R. 2-4) properly pleaded a violation by petitioners of the supplement of 1910 to the Safety Appliance Act (Act of April 14, 1910, c. 160, 36 Stat. 298, 45 U. S. C. A., §§ 11-16) relating to the equipment of cars with efficient hand brakes. Under the Safety Appliance Act there is imposed upon the carriers an absolute duty to have any and all cars used or hauled by them equipped with the appliance required by the act.

St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 28 S. Ct. 616, 52 L. Ed. 1061;

Chicago, B. & Q. R. Co. v. United States, 220 U. S. 559;

Louisville & N. R. Co. v. Layton, 243 U. S. 617, 37 S. Ct. 456, 61 L. Ed. 931;

Great Northern R. Co. v. Otos, 239 U. S. 349, 36 S. Ct. 124, 60 L. Ed. 322;

Spokane & I. E. R. Co. v. Campbell, 241 U. S. 497, 36 S. Ct. 682, 60 L. Ed. 1125;

Texas & P. R. Co. v. Rigsby, 241 U. S. 33, 36 S. Ct. 482, 60 L. Ed. 874;

Minneapolis & St. L. R. Co. v. Gotschall, 244 U. S. 66, 37 S. Ct. 597, 61 L. Ed. 995;

Brady v. Terminal R. Assn. of St. Louis, 303 U. S. 10, 58 S. Ct. 426, 82 L. Ed. 614.

II.

(A) There was no error in the opinion and decision of the Supreme Court of Missouri in ruling to the effect that proof of a specific physical defect in a hand brake was not essential to the establishment of a violation of Section 11 of the Safety Appliance Act (45 U. S. C. A., § 11), requiring the equipment of cars with "efficient hand brakes," and that proof of the failure of a hand brake to work efficiently, when used in the customary and proper manner, was sufficient proof of violation of the act to fasten liability on the carrier.

Lehigh Valley R. Co. v. Howell, 2 Cir., 6 F. 2d 784, certiorari denied 268 U. S. 695, 45 S. Ct. 513, 69 L. Ed. 1162;

Didinger v. Pennsylvania R. Co., 6 Cir., 39 F. 2d 798;

Detroit, T. & I. R. Co. v. Hahn, 6 Cir., 47 F. 2d 59, certiorari denied 283 U. S. 842, 51 S. Ct. 489, 75 L. Ed. 1452;

Chesapeake & O. R. Co. v. Gowen, 6 Cir., 65 F. 2d 260;

Spotts v. Baltimore & O. R. Co., 7 Cir., 102 F. 2d 160, certiorari denied 307 U. S. 641, 59 S. Ct. 1039, 83 L. Ed. 1522;

Henry v. Cleveland, C. C. & St. L. R. Co., 332 Mo. 1072, 61 S. W. 2d 340, certiorari denied 290 U. S. 627, 54 S. Ct. 70, 78 L. Ed. 546;
Colwell v. St. Louis-S. F. R. Co., 335 Mo. 494, 73 S. W. 2d 222;
Cason v. Kansas City Terminal R. Co. [Mo. Sup.], 123 S. W. 2d 133;
Gieseking v. Litchfield & Madison R. Co. [Mo. Sup.], 127 S. W. 2d 700, certiorari denied 308 U. S. 583, 60 S. Ct. 104, 84 L. Ed. 488;
Anderson v. Chesapeake & O. R. Co., 352 Ill. 561, 186 N. E. 185, certiorari denied 290 U. S. 675, 54 S. Ct. 93, 78 L. Ed. 583;
Hosman v. Southern Pac. Co., 28 Cal. App. 2d 621, 83 Pac. 2d 88, certiorari denied 306 U. S. 656, 59 S. Ct. 645, 83 L. Ed. 1054;
Spencer v. Seaboard Air Line R. Co., 201 N. C. 537, 160 S. E. 763, certiorari denied 285 U. S. 539, 52 S. Ct. 312, 76 L. Ed. 932.

(B) As in the case of the requirement of the Safety Appliance Act relating to the equipment of cars with automatic couplers, the test of the compliance with the requirement of the act pertaining to efficient hand brakes is effectiveness and efficiency in the operation of the appliance.

Chicago, R. I. & P. R. Co. v. Brown, 229 U. S. 317, 33 S. Ct. 840, 57 L. Ed. 1204;
San Antonio & A. P. R. Co. v. Wagner, 241 U. S. 476, 36 S. Ct. 626, 60 L. Ed. 1110;
Minneapolis & St. L. R. Co. v. Gotschall, 244 U. S. 66, 37 S. Ct. 597, 61 L. Ed. 995;
Roberts' Federal Liability of Carriers, 2d Ed., Vol. 2, § 640, p. 1232.

III.

There was no error in the opinion and decision of the Supreme Court of Missouri to the effect that the pleading and the proof was sufficient to permit the respondent

(plaintiff) to recover by reason of petitioners' violation of the order of the Interstate Commerce Commission made and entered on March 13, 1911, pursuant to the provisions of Section 12 of the Safety Appliance Act (45 U. S. C. A., § 12). The Commission's order, like Section 11 of the Safety Appliance Act (45 U. S. C. A., § 11), required simply that box cars be equipped with "efficient hand brakes."

Roberts' Federal Liability of Carriers, 2d Ed., Vol. 2, pp. 2010-2012;

Spotts v. Baltimore & O. R. Co., 7 Cir., 102 F. 2d 160, certiorari denied 307 U. S. 641, 59 S. Ct. 1039, 83 L. Ed. 1522.

IV.

There was no error in the opinion and decision of the Supreme Court of Missouri to the effect that petitioners' violation of Section 11 of the Safety Appliance Act (45 U. S. C. A., § 11) constituted negligence under the Federal Employers' Liability Act (45 U. S. C. A., §§ 51-59), so as to permit respondent (plaintiff) to maintain an action for his injuries under the latter act.

San Antonio & A. P. R. Co. v. Wagner, 241 U. S. 476, 36 S. Ct. 626, 60 L. Ed. 1110;

Moore v. Chesapeake & O. R. Co., 291 U. S. 205, 54 S. Ct. 402, 78 L. Ed. 755.

V.

The Supreme Court of Missouri did not err in failing to follow the latest ruling of the federal courts upon the issues involved. The opinion and decision of the state court was in complete harmony with those rulings and decisions of this and the other federal courts which are cited above under points I and IV, inclusive.

ARGUMENT.

I.

The first point made by petitioners here ultimately resolves itself into nothing more than a contention that respondent's (plaintiff's) petition is insufficient to charge petitioners (defendant) with a violation of the provisions of the Safety Appliance Act relating to hand brakes, which contention is based upon petitioners' assertions that, while the act made it unlawful for them to haul a car not equipped with an efficient hand brake, it did not require them to equip this car L. & N. 12670, which was owned by another railroad, with such a hand brake, and that respondent's (plaintiff's) petition predicates liability solely upon petitioners' (defendants') failure to equip that car with such a hand brake. Neither of these assertions is tenable.

In so far as it is here pertinent, the provision of the Safety Appliance Act relating to hand brakes (Act of Apr. 14, 1910, c. 160, Sec. 2, 36 Stat. 298, 45 U. S. C. A., § 11) provides:

> "**It shall be unlawful for any common carrier** subject to the provisions of this chapter **to haul, or permit to be hauled or used on its line any car** subject to the provisions of this chapter **not equipped with the appliances herein provided for, to wit: All cars must be equipped with * * * efficient hand brakes * * *.**" (Emphasis supplied.)

And the penalty section of the act (Act of Apr. 14, 1910, c. 160, Sec. 4, 36 Stat. 299, 45 U. S. C. A., § 13), in so far as is here pertinent, provides:

> "**Any common carrier** subject to this chapter **using, hauling, or permitting to be used or hauled on its line, any car** subject to the requirements of this chapter

> **not equipped as provided in this chapter, shall be liable** to a penalty * * * and nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employee caused to such employee by reason of or in connection with the movement or hauling of such a car which is defective or insecure or **which is not maintained in accordance with the requirements of this chapter** * * *." (Emphasis supplied.)

A mere reading of the pertinent provisions of this act shows that, by very specific language, it makes unlawful a carrier's use or hauling, or a carrier's permitting the use or hauling on its line, of *any car* not equipped with an "efficient hand brake." As this Court has so aptly said, violation of the act, and liability under it, "springs from its being made unlawful to use cars not equipped as required" (Louisville & Nashville R. Co. v. Layton, 243 U. S. 617, 621, 37 S. Ct. 456, 61 L. Ed. 931), and "if the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it" (St. Louis & I. M. Ry. Co. v. Taylor, 210 U. S. 281, 295, 28 S. Ct. 616, 52 L. Ed. 1061).

Now, a mere reading of the respondent's (plaintiff's) petition in this case (R. 2-4), the material portions of which we have heretofore quoted herein (ante, pp. 5, 6), and will not repeat, conclusively demonstrates that it alleges the facts that plaintiff, while working upon cars being "used, hauled, moved, transported and classified on defendants' lines in defendants' Luther Avenue Yard," and while attempting to use a hand brake on one of said cars—being L. & N. 12670, was thrown from said car and injured by reason of the sudden reversing of said hand brake, which was inefficient, as a result of the defendants'

failure to comply with the provisions of the Safety Appliance Act, and the orders of the Interstate Commerce Commission, requiring that cars "used" or "hauled" by a carrier be equipped with "efficient hand brakes." The petition, therefore, properly and sufficiently pleaded the facts essential to predicating petitioners' liability upon a violation of the act and the said orders of the Interstate Commerce Commission requiring efficient hand brakes, and the opinion and decision of the Supreme Court of Missouri in specifically so holding (R. 337; 149 S. W. 2d, l. c. 801-802) was not in the least erroneous.

Notwithstanding that respondent's (plaintiff's) petition pleaded all of the facts essential to predicate petitioners' liability under the Safety Appliance Act, they assert that, in pleading that the occurrence producing plaintiff's injuries, and his injuries, resulted from "defendants' failure to perform their duty * * * to have said box car [L. & N. 12670] equipped with an efficient hand brake," the petition pleaded only a duty which was not owed by petitioners (defendants), because the act did not impose upon them the duty to equip this car, which belonged to another railroad, with an efficient hand brake. The language of the allegation just quoted, if strictly construed, does not place upon petitioners (defendants) the duty *to equip this car* with an efficient hand brake—it only placed upon them the duty *to have it so equipped when used and hauled by them*, whether it be so equipped by them or by someone else.

However, even if petitioners (defendants) were entirely correct in their assertion that the plaintiff's petition was predicated solely and only upon an alleged failure of petitioners to equip this car with an efficient hand brake, still it would have properly and sufficiently charged them with a duty which was owing by them under the Safety Appli-

ance Act. From what we have heretofore said upon the authority of this Court's decisions, it is manifest that the Act, simply, makes it unlawful for a carrier to "use," "haul," or "permit to be used or hauled on its line," "any car" not equipped with an "efficient hand brake." The carrier has the duty, and the option, to comply with the Act either by not using, hauling, or permitting to be used or hauled on its line, any car not so equipped, or by properly equipping such cars as it does use, haul or permit to be used or hauled on its line, so that they will meet the requirements of the Act. Under the Act, the duty of a carrier which does, in point of fact, use or haul a car, is to equip it with the required appliances (Cf. Spokane & I. E. R. Co. v. Campbell, 241 U. S. 497, 36 S. Ct. 683, 60 L. Ed. 1125; Texas & Pac. R. Co. v. Rigsby, 241 U. S. 33, 36 S. Ct. 482, 60 L. Ed. 874; Minneapolis & St. Louis R. Co. v. Gotschall, 244 U. S. 66, 37 S. Ct. 597, 61 L. Ed. 995; Brady v. Terminal R. Assn. of St. Louis, 303 U. S. 10, 58 S. Ct. 426, 82 L. Ed. 614), and, this, irrespective of the ownership of the car. This was clearly recognized by this Court in Chicago B. & Q. R. Co. v. United States, 220 U. S. 559, 31 S. Ct. 612, 55 L. Ed. 582, wherein this Court adopted from the decision of the Circuit Court of Appeals in that case the following language (220 U. S., l. c. 570):

> "The act made it unlawful for railroads to use cars not equipped as therein provided **and thereby imposed a duty upon railroad companies to equip cars accordingly.**" (Emphasis ours.)

Manifestly, there is no merit in petitioners' point concerning alleged error by the Supreme Court of Missouri with respect to the sufficiency of respondent's (plaintiff's) petition to charge petitioners with actionable violation of the provisions of the Safety Appliance Act relating to efficient hand brakes.

II.

The second point made by petitioners here, defendants below, ultimately resolves itself into a contention that respondent (plaintiff) failed to make a submissible case of a violation of the provision of the Safety Appliance Act relating to hand brakes because there was no proof that the hand brake on this box car, L. & N. 12670, contained any physical defects, or was "defective."

The language of both of Section 11 of the Safety Appliance Act (Act of April 14, 1910, c. 160, Sec. 2, 36 Stat. 298, 45 U. S. C. A., § 11), and of the order of the Interstate Commerce Commission entered, pursuant to the provisions of section 12 of the act, on March 13, 1911,* specifically requires that cars coming within their provisions be equipped with "**efficient**" hand brakes. We frankly concede our inability to find any decision of this Court which passes directly upon this aspect of the provisions of the act and of the order of the Commission relating to "efficient hand brakes," but, in numerous decisions of both the lower federal courts and the state courts, it repeatedly has been ruled that the terms "defective" and "inefficient" are not synonymous, and proof of the failure of a hand brake to work efficiently, when used in the customary and proper manner, is sufficient to establish a violation of the act and the order of the Commission, and to fasten liability upon the carrier, without proof of any specific physical defect in the appliance (Cf. Lehigh Valley R. Co. v. Howell, 2 Cir., 6 F. 2d 784, certiorari denied 268 U. S. 695, 45 S. Ct. 513, 69 L. Ed. 1162; Didinger v. Pennsylvania R. Co., 6 Cir., 39 F. 2d 798; Detroit, T. & I. R. Co. v. Hahn, 6 Cir., 47 F. 2d 59, certiorari denied 283 U. S. 842, 51 S. Ct. 489, 75 L. Ed. 1452; Chesapeake & O. R. Co.

*The pertinent provisions of this order of the Interstate Commerce Commission are hereinafter set out (post, p. 18).

v. Gowen, 6 Cir., 65 F. 2d 260; Spotts v. Baltimore & O. R. Co., 7 Cir., 102 F. 2d 160, certiorari denied 307 U. S. 641, 59 S. Ct. 1039, 83 L. Ed. 1522; Henry v. Cleveland, C. C. & St. L. R. Co., 332 Mo. 1072, 61 S. W. 2d 340, certiorari denied 290 U. S. 627, 54 S. Ct. 70, 78 L. Ed. 546; Colwell v. St. Louis-S. F. R. Co., 335 Mo. 494, 73 S. W. 2d 222; Cason v. Kansas City Terminal R. Co. [Mo. Sup.], 123 S. W. 2d 133; Gieseking v. Litchfield & Madison R. Co. [Mo. Sup.], 127 S. W. 2d 700, certiorari denied 308 U. S. 583, 60 S. Ct. 104, 84 L. Ed. 488; Anderson v. Chesapeake & O. R. Co., 352 Ill. 561, 186 N. E. 185, certiorari denied 290 U. S. 675, 54 S. Ct. 93, 78 L. Ed. 583; Hosman v. Southern Pac. Co., 28 Cal. App. 2d 621, 83 Pac. 2d 88, certiorari denied 306 U. S. 656, 59 S. Ct. 645, 83 L. Ed. 1054; Spencer v. Seaboard Air Line R. Co., 201 N. C. 537, 160 S. E. 763, certiorari denied 285 U. S. 539, 52 S. Ct. 312, 76 L. Ed. 932).

The rationale of these decisions is clearly expressed in Didinger v. Pennsylvania R. Co., supra, wherein it is said (39 F. 2d, l. c. 799):

> "There are two recognized methods of showing the inefficiency of hand brake equipment. Evidence may be adduced to establish some particular defect, or the same inefficiency may be established by showing a failure to function, when operated with due care, in the normal, natural, and usual manner. * * *
>
> "Assuming the proper setting of the brake, the fact that it did not hold demonstrates its inefficiency."

The rationale of these decisions is, furthermore, founded upon the decisions of this Court in cases involving automatic couplers required by Section 2 of the Safety Appliance Act* (Cf. Chicago, R. I. & P. R. Co. v. Brown, 229 U. S. 317, 33 S. Ct. 840, 57 L. Ed. 1204; San Antonio & A.

*Act of March 2, 1893, c. 196, Sec. 2, 27 Stat. 531, 45 U. S. C. A. § 2.

P. R. Co. v. Wagner, 241 U. S. 476, 36 S. Ct. 626, 60 L. Ed. 1110; Minneapolis & St. Louis R. Co. v. Gotschall, 244 U. S. 66, 37 S. Ct. 597, 61 L. Ed. 995), because the character of the devices required by the Safety Appliance Act in each instance—i. e., the hand brakes and the couplers—is described by their operation. The test of the observance of the duty imposed by the Safety Appliance Act with respect to both of these appliances—i. e., hand brakes and couplers—is the performance of the appliance, and is not whether the appliance contains a physical defect. In this connection, in Roberts' Federal Liability of Carriers, 2d Ed., Vol. 2, § 640, p. 1232, it was aptly said:

> "As in the case of automatic couplers, the test of compliance with this requirement of the statute [requiring efficient hand brakes] is primarily effectiveness in operation." (Bracketed portion supplied.)

The petitioners here do not contend, and cannot contend, that there was no proof of the inefficiency of the hand brake here involved, and, manifestly, there is no merit to the petitioners' contention that the Supreme Court of Missouri erred in permitting a recovery by respondent Wild upon proof of the inefficiency of the hand brake, even though there was no proof of a physical defect in the brake. In this connection, too, it is of interest to note that the contention of petitioners now under consideration constitutes a complete "about face" by them, for, in the trial court, the jury was instructed at their instance (R. 317-318), as well as at the instance of plaintiff (R. 315-316), that a recovery by plaintiff could be predicated upon a finding of the "inefficiency" of the hand brake.

III.

The third point made by petitioners here, to the effect that there was no proof of any violation of the order of the Interstate Commerce Commission entered on March 13, 1911, may be disposed of quickly.

That order of the Commission, which may be found set out in full in the appendix of Roberts' Federal Liability of Carriers, 2d Ed., Vol. 2, pp. 2010-2012, is, in so far as is here pertinent, as follows:

> "It is ordered, That the number, dimensions, location, and manner of application of the appliances provided for by section two of the act of April 14, 1910, and section four of the act of March 2, 1893, shall be as follows:
>
> BOX AND OTHER HOUSE CARS
>
> HAND BRAKES
>
> NUMBER. Each box or other house car shall be equipped with *an efficient hand brake* which shall operate in harmony with the power brake thereon. *The hand brake may be of any efficient design*, but must provide the same degree of safety as the design shown on Plate A." (Emphasis supplied.)

Manifestly, the requirement of the order of the Commission, like the requirement of Section 11 of the Safety Appliance Act, is simply that box cars, such as car L. & N. 12670 here involved, be equipped with "efficient hand brakes." The petitioners' use and hauling of a car which was not equipped with an efficient hand brake, in the instant case, violated both the act and the order of the Commission, for, as was said in Spotts v. Baltimore & O. R. Co., 7 Cir., 102 F. 2d 160, 163, certiorari denied 307 U. S. 641, 59 S. Ct. 1039, 83 L. Ed. 1522:

> "* * * The order of the Interstate Commerce Commission is merely a direction to comply with the statute requiring an 'efficient hand brake.' * * *
>
> "Here the Commission has prescribed merely any 'efficient hand brake'; it has included no specific requirements and fixed no standard as filling the demands of 'efficiency.' * * *"

IV.

The fourth point made by petitioners here is to the effect that there was no proof of negligence so as to make the Federal Employers' Liability Act applicable to respond-

ent's (plaintiff's) case. This contention is so lacking in merit as to require no further discussion than to point out that it is directly in the teeth of the repeated pronouncements of this Court to the effect that a violation of the Safety Appliance Act is the legal equivalent of negligence per se under the Federal Employers' Liability Act (Cf. San Antonio & A. P. R. Co. v. Wagner, 241 U. S. 476, 484-485, 36 S. Ct. 626, 60 L. Ed. 1110; Moore v. Chesapeake & O. R. Co., 291 U. S. 205, 210-211, 54 S. Ct. 402, 78 L. Ed. 755).

V.

The fifth and final point made by petitioners here is that the Supreme Court of Missouri erred in not following the latest decision of the federal courts under the Safety Appliance Act relating to hand brakes—it being petitioners' assertion that such "latest decision" is the decision in Grand Trunk W. R. Co. v. Holstein, 6 Cir., 67 F. 2d 780.

The latest decision of the federal courts involving the provisions of the Safety Appliance Act relating to hand brakes is the decision in Spotts v. Baltimore & O. R. Co., 7 Cir., 102 F. 2d 160, certiorari denied 307 U. S. 641, 59 S. Ct. 1039, 83 L. Ed. 1522, and, although that decision is not mentioned specifically in the opinion and decision of the Supreme Court of Missouri below (R. 336-348; 149 S. W. 2d 800), the holdings in the two decisions are identical, and are in accord with the numerous decisions of the federal and state courts which are referred to under point I of this brief.

The decision in Grand Trunk W. R. Co. v. Holstein, 67 F. 2d 780, so strongly relied upon by petitioners here, is not only not the latest decision of the federal courts upon the matters here involved, but it is to be distinguished from the case at bar by the language of the Circuit Court of Appeals there when it said (l. c. 783):

> "* * * The statements of the plaintiff at the time, and on the scene, of his injury practically destroy the credibility of his later story upon the witness stand. * * *"

The decision in the Holstein case rested upon the lack of credence in the plaintiff's statements respecting the inefficiency of the hand brake, but there was no such situation presented in the case at bar. Here, at all times following his injury, plaintiff consistently stated that the cause of his injury was the inefficiency of the hand brake (R. 100, 102, 105, 259, 276, 287, 290, 293), and no witness testified that a brake which operated as this one did would be an efficient hand brake. This distinction was properly recognized by the Supreme Court of Missouri in its opinion and decision below (R. 240; 149 S. W. 2d, l. c. 803).

CONCLUSION.

In conclusion, respondent most respectfully submits that the Supreme Court of Missouri was not in error, and was not in the slightest conflict with the controlling decisions of this Court and the lower federal courts, in its rulings in the opinion and decision here sought to be reviewed. Accordingly, respondent most respectfully submits that petitioners' petition for a writ of certiorari herein should be denied by this Honorable Court, because the granting of such writ would serve no useful purpose, but, on the contrary, would result merely in further delaying respondent from receiving compensation to which he is entitled by law for his injuries.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1941

No. 164

NORMAN B. PITCAIRN and FRANK C. NICODEMUS, JR., RECEIVERS OF WABASH RAILWAY COMPANY, a Corporation, Petitioners,

vs.

RICHARD F. WILD, Respondent.

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

OCTOBER TERM, 1941

No. 164

NORMAN B. PITCAIRN and FRANK C. NICODEMUS, JR., RECEIVERS OF WABASH RAILWAY COMPANY, a Corporation, Petitioners,

vs.

RICHARD F. WILD, Respondent.

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

While the brief of the respondent was not filed within the time required by the Rules of the Court and the petitioners waived any objections they would have had, they feel that there are some statements, concessions and contention in respondent's brief, which may very properly be called to the attention of the Court by this reply, which we trust the Court will consider.

The respondent does not make any point that the petition for the writ was not filed in time, for it was so filed, or that the decision of the Supreme Court of Missouri did not become the final decision of the highest court of the state upon the overruling of the petitioner's motion to transfer the cause to the Court en Banc. Therefore the Rules of the Missouri Supreme Court and the provisions of the Missouri Constitution relating to motions for rehearing and to transfer of causes from a division of that Court to the Court en Banc, set out in the appendix to petitioners' petition and brief (pages 50, 51) are not important in so far as any objections of the respondent to the granting of the petition are involved.

Before taking up in order the points in respondent's brief in opposition to the reasons for the writ as stated in the petition, we wish to call attention to a statement in respondent's brief, which seems to be a definite concession that there is a good and sufficient reason why the Court should grant the petition and review the judgment of the state court in this case. That concession is the statement on page 15 in the second sentence in the second paragraph, where, after referring to the point made by petitioners in paragraph two of the Reasons Relied on for Allowance of the Writ (Petition, page 11), ~~that~~ and in the argument in their brief (pages 26 to 33) that the evidence did not show and the jury was not required to find that the hand brake was defective, the respondent says, "We frankly concede our inability to find any decision of this Court which passes directly upon this aspect of the provisions of the act, and of the order of the Commission relating to 'efficient hand brakes,' * * *." This point will be discussed later in this reply where we endeavor to show the reasons why the cases relied upon

by respondent construing and applying the earlier Safety Appliance Acts, like the act requiring that cars be equipped with couplers coupling automatically by impact, the very purpose of which is to eliminate human energy and effort in the operation of the appliance, are not applicable and should not be followed in this case, arising under the later statute relating to hand brakes, which the evidence of the respondent in this case shows cannot be operated in any other way than by the exercise of the human energy and effort of the operator (the respondent in this case), which human energy and effort must be exerted and applied with care, caution and exactness in order to be effective and to avoid injury to the employee.

I.

The first reason for the writ as stated in the petition and the point which respondent discusses in Point I of his reply is that the respondent only pleaded, and the judgment is based solely upon, facts not made unlawful by the Safety Appliance Act, that is that the petitioners (defendants) failed to have the L. & N. Railway Company's car equipped with an "efficient hand brake."

However earnestly and often counsel for respondent may endeavor to explain, evade or deny the cause of action alleged in his petition, the fact remains that the cause of action alleged—and the **only** cause of action alleged—is that respondent's injuries **"directly and proximately resulted from defendants' failure to perform their duty** under the Statutes of the United States of America (commonly known as the Federal Safety Appliance Act), **and the orders, rules and regulations of the Interstate** Commerce Commission of the United States made and

promulgated pursuant thereto, in such cases made and provided, **to have said box car equipped with an efficient hand brake"** (R. 3).

The respondent is surely bound by the definite and plain allegation of his petition. He may not change that allegation now by claiming that he meant something which he did not allege, or that what he alleged means something different from what it plainly charges. It is not necessary to argue against the respondent's contention that the statute makes it unlawful for a carrier to haul or use a car not equipped as the statute requires. That may be conceded. The trouble, however, with respondent's case and contention is that he did not base his right to recover on a charge that the petitioners did the affirmative act made unlawful by the statute, that is, that they used a car, which did not have an efficient hand brake, but charged the petitioners with a negative omission, a failure to do something that the statute did not require them to do, that is to have another carrier's car equipped as the statute and the order of the Interstate Commerce Commission required. The statement in plaintiff's petition, quoted in respondent's brief, that while he was working on cars being used on defendants' lines and in defendants' Luther Avenue yards he was on a car and when he was on the car and attempted to use the hand brake on the car it reversed and threw him from the car, does not change the direct and positive allegation that his injuries "directly and proximately resulted from defendants' failure to perform their duty * * * to have said box car equipped with an efficient hand brake."

If there were any room for doubt as to what this charge

in the plaintiff's petition means, and we do not believe there can be, it would be removed and overcome by the allegation in the paragraph of plaintiff's petition immediately following the part quoted, which is as follows:

"Plaintiff further states that, **as a direct and proximate result of defendants' aforesaid failure** to comply with the aforesaid laws of the United States of America and the aforesaid orders, rules and regulations of said Interstate Commerce Commission," plaintiff received the injuries described.

The Safety Appliance Act does not make it the duty of one carrier to equip another carrier's car with **secure** hand holds or with **efficient** hand brakes, but the respondent in this case alleged and recovered on the ground that the petitioners failed to do what the act did not require them to do. If there was any liability for a failure to have the L. & N. car equipped with a proper hand brake, the liability and the right to recover were against the owner of that car. If respondent was injured as the "direct and proximate result" of failure to "have said box car equipped with an efficient hand brake," as he twice alleges, his right to recover was against the owner. While the respondent twice alleges that he was injured as the "direct and proximate result" of failure to have the car equipped, he does not once allege that he was injured as the result of the defendants using or hauling a car not properly equipped, which is the thing the act makes unlawful. This is clearly shown by section 3 of the Act of April 14, 1910, section 13, Title 45, U. S. Code, which is set out in full on page 48 of petitioners' petition and brief, and only partly quoted in respondent's brief at pages 11 and 12. The first part of the section shows that

penalty provided is for **using** or **hauling**, or permitting to be used or hauled, and nothing else. The portion of the section quoted at the top of page 12 of respondent's brief provides that "nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employee caused to such employee **by reason of or in connection with the movement or hauling** of such a car which is **defective or insecure** or which is not maintained in accordance with the requirements of this chapter * * *." (Emphasis ours.) This shows very definitely it would seem that the only liability for injury or death of an employee is **"by reason of or in connection with the movement or hauling of such a car which is defective or insecure."** As might be expected, the respondent did not supply any emphasis to the parts here emphasized. We shall refer later to the part of this section of the act, which so clearly shows that the liability to an injured employee is only in connection with or by reason of "the movement or hauling of a car which is **defective or insecure,**" and that the carrier is not liable and an employee is not entitled to recover when he is injured while using a hand brake unless he alleges in his pettition, proves by the evidence and requires the jury to find that the car was "defective or insecure." All of which the state court held was unnecessary in this case.

The two cases respondent cites on page 12 of his brief, the Layton Case (243 U. S. 617) and the Taylor Case (210 U. S. 281), shows that this Court has held that liability under the Safety Appliance Acts involved in those cases, both for the penalty and for the injury to an employee, results from the use of a car not properly equipped, and not from a failure to equip the car of another rail-

road. We are unable to see how respondent finds any support in these cases. It will be remembered that neither of these cases involved the use of a hand brake, and that respondent's counsel say in their brief that they have been unable to find a decision of this Court involving such use.

In Louisville & N. R. Co. v. Layton, 243 U. S. 617, the Court at page 618 said:

> "The recovery in the case was on the first count of the petition, which alleges that the defendants were * * * **negligent** among other things in permitting the **use** of the car attached to the engine and of the car to which the attempt was made to couple it, without such cars being equipped with automatic couplers, which would couple by impact, as required by law, * * *."

On page 621, the Court, interpreting and applying the statute as written, says:

> "* * * The language of the Acts (the Safety Appliance Acts) and the authorities we have cited make it entirely clear that the liability in damages to employees for failure to comply with the law springs from its being made unlawful to **use** cars not equipped as required * * *." (Emphasis ours.)

It probably is not necessary to cite cases to support the proposition that the Court will consider and determine the nature of the pleading and the nature of the cause of action alleged from the language of the pleading and not from what counsel now say they intended to allege or from their interpretation of the plain language they used. We call attention, however, to one recent decision of this Court on this point.

In American Propeller & Manufacturing Co. v. United States, 300 U. S. 475, the Court, at page 478, quoted from its opinion in another case and said that the principle there stated "suggests that the Court should not affirm what is clearly an unjust and inequitable result unless under plain compulsion of law."

The Court, at page 479, rejected the contention of the United States that the finding of the Court below should be sustained based upon a presumption of official regularity, and said:

> "But we are dealing here not with a presumption, but with a specific finding; and that finding should be examined in the light of the pleadings."

It seems clear that the state court in holding that the respondent was entitled to recover under the Safety Appliance Act of April 14, 1910, for failure of the petitioners to equip the car of another carrier with an efficient hand brake, when the Act only creates liability against a carrier for injuries or death of an employee "by reason of or in connection with the movement or hauling of such car," has decided a Federal question of substance not heretofore determined by this Court, and has decided the question in a way probably not in accord with applicable decisions of this Court, requiring that the nature of the cause of action upon which a plaintiff seeks to recover, must be determined from the pleading filed by the plaintiff. Under the Rules of this Court, the review of that decision would seem to be the exercise of sound judicial discretion.

II.

The respondent disregards the definite distinction that exists between the provisions of the Acts of Congress relating to hand brakes and other safety appliance, particularly automatic couplers, and between the manner of operation of these different appliances.

The provisions of the act relating to equipping cars with hand brakes, enacted April 14, 1910, and the automatic coupler and air brake act of March 2, 1893, amended March 2, 1903, are entirely different. The manner of operation of automatic couplers is entirely different from the manner of operating hand brakes and in both respects, and for both reasons the decisions of the courts under the automatic coupler law are not applicable in cases arising under the hand brake law.

While some state and federal courts have held that evidence of failure of a hand brake appliance to function properly when used in normal and proper manner, was sufficient to justify a jury in finding from that evidence that the appliance was defective, no appellate decision has been cited, and we believe none can be found, certainly no decision of this court can be found, which holds that a verdict of a jury should be approved when the jury was not required by the instructions of the court, to find from the evidence that the appliance was defective.

The respondent on page 15 of his brief in opposition to the petition, after referring to the word "efficient" as contained in the Act of April 14, 1910, and the order of the Interstate Commerce Commission made pursuant to that Act, says:

"We frankly concede our inability to find any de-

> cision of this Court which passes directly upon this aspect of the provisions of the Act and of the order of the Commission relating to 'efficient hand brakes'."

The respondent then argues that the decisions of the lower federal courts and the state courts should be followed by this court presumably, and apparently, because this court in eight cases cited by the respondent denied certiorari to review the decisions of those courts.

Counsel for respondent in their brief cite eight different cases in which they say this court denied certoirari. They call attention nineteen times to the action of the Court denying certiorari and they state five times that certiorari was denied in Spotts v. Baltimore & Ohio R. Co., 7 Cir., 102 F. (2d) 160, which is the case upon which they seem to rely most hopefully.

They seem to have entirely overlooked the ruling announced by this court, both upon the oral argument of cases and in its opinions, that the denial of a petition for writ of certiorari means only that the writ was denied.

This court in United States v. Carver, 260 U. S. 482, a libel in personam against the United States and the receiver of a corporation, at page 490, says:

> "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times. Therefore it is unnecessary to consider whether the libellants' argument is supported by the decisions to which they refer."

In Atlantic Coast Line R. Co. v. Powe, 283 U. S. 401, the action was under the Federal Employers' Liability Act

for the death of a switchman who was killed when he came into contact with a semaphore placed at a greater distance from the track than the order of the South Carolina Railroad Commission prescribed.

The Court in the opinion by Mr. Justice Holmes at page 403 said:

> "* * * No negligence is proved against the petitioner. It is urged that a certiorari was denied in Central of Georgia Ry. Co. v. Davis, 7 F. (2d) 269, which seemed to qualify the doctrine in the Berkshire case (254 U. S. 415). But 'the denial of a writ of certiorari imparts no expression of opinion upon the merits of the case, as the bar has been told many times.' United States v. Carver, 260 U. S. 482, 490."

The judgment of the Supreme Court of South Carolina was reversed.

These decisions of the Court would seem to fully justify the conclusion that the denial of certiorari in the numerous cases cited and relied upon by respondent, and particularly the denial in the Spotts case (102 F. [2d] 160), will not be held to support the decision of the state court in this case and we believe the Court will not be influenced in the consideration of the petition for the writ in this case by the numerous citations of denial in other cases.

In South Chicago Coal & Dock Co. v. Bassett, 309 U. S. 251, the Court reviewed the decision of the Court of Appeals and at page 253 said: "Because of an alleged conflict with a decision of the Court of Appeals of the Fifth Circuit in the case of Maryland Casualty Co. v.

Lawson, 93 F. (2d) 190, we granted certiorari." The question in that case was whether the deceased was a member of the crew of the vessel on which he was performing services within the meaning and scope of the Longshoremen's and Harbor Workers' Compensation Act.

The Court at page 258 says:

> "Petitioners urge that the question whether the decedent was a member of a 'crew' was a question of law. That is, that upon the undisputed facts the decedent must be held as a matter of law to have been a member of a 'crew' as distinguished from a longshoreman or laborer at work upon the vessel. We are unable so to conclude.
>
> "The word 'crew' does not have an absolutely unvarying legal significance."

The Court then cited a case which stated varying uses of the term and at page 259 says, "It was therefore deemed necessary to consider the context of the particular use of the term and the object to be accomplished by the enactment under consideration."

The Court held that the term "crew" in that case did not apply to the deceased.

So in this case, it seems that the petitioners are fully justified in asking the Court to review the decision of the state court to consider and determine whether the use of the term "efficient hand brake" as used in section 2 of this Safety Appliance Act, means that the carrier is an insurer at all hazards and regardless of whether the appliance is defective, or if that term is to be interpreted and applied in connection with and in the light of the use of the terms "defective and insecure" and "defective" and "out of re-

pair" as used five times in sections 4 and 5 of the same Safety Appliance Act in defining the conditions and circumstances under which a carrier may be or may not be liable for using a car, having a defective hand brake. It will be noted that in every instance where the carrier is to be held liable either for the penalty or for injury to an employee, it is only for the movement of a car that is defective. The state court wholly overlooked this.

The title of the Act of April 14, 1910, shows that the Act was not intended as insurance against injury. The title is "An Act to *supplement* 'An Act to *promote* the safety of employees and travelers upon railroads,'" etc. To "promote" does not mean to "insure." It means to help to contribute to the prosperity of employees and travelers upon railroads.

It is clear that Congress intended to and did make a distinction in this Act between sill steps and hand holds or grab irons, and hand brakes, for in section 2 of the Act it said that "all cars must be equipped with *secure* sill steps and *efficient* hand brakes; all cars requiring *secure* ladder and *secure* running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with *secure* hand holds or grab irons." The term "secure" means safe, free from danger, incapable of doing harm and is applied to appliances and equipment which are fixed, permanent parts of a car and are not operated or put into action or use by any human action or agency, whereas the only way the hand brake can be used or made useful or effective or efficient is by human action, agency and energy. The distinction and difference are still greater when the requirements of the statutes and manner of use of automatic couplers and hand brakes are considered.

In United States v. American Trucking Association, 310 U. S. 534, the Court stated principles which seem applicable to the questions involved in this case now presented to the Court. In that case, at page 541, the Court said:

> "In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. There is no invariable rule for the discovery of that intention. To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute, particularly in a law drawn to meet many needs of a major occupation."

The respondent cites several decisions of this Court in cases which arose under the Act of March 2, 1893, requiring that cars be equipped with automatic couplers and efficient handholds. Respondent argues that the ruling of this Court in automatic coupler cases ought to be applied in this case. This Court has answered that argument by its ruling in Wright v. United States, 302 U. S. 583, in answering the similar argument with respect to the decision of the Court in the Pocket Veto case. The Court, at page 593, said:

> "In interpreting the word 'adjournment', and in referring to other provisions of the Constitution using the word 'adjourn', the Court was still addressing itself to a case where there had been an adjournment by the Congress. The Court did not decide, and there was no occasion for ruling, that the clause applies where the Congress has not adjourned and a temporary recess has been taken by one House during the session of Congress. Any observations which

could be regarded as having a bearing upon the question now before us would be taken out of their proper relation. The oft-repeated admonition of Chief Justice Marshall 'that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used', and that if they go 'beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision', has special force in this instance. Cohen v. Virginia, 6 Wheat. 264, 399, 5 L. ed. 257, 290."

The ruling of the Court in the case just cited seems to fully justify the petitioners here in asking the Court in passing upon the petition for the writ to disregard the decisions of the Court in the cases arising under the automatic coupler law as well as the rulings and orders of the Court in denying certiorari in the numerous cases cited by respondent.

While the respondent expresses dissatisfaction with the statement of facts made by the petitioners there are certain portions of the respondent's statement which we accept as correct, for they state the facts as petitioners have stated them. Respondent says on page 3 of his brief in opposition to the petition, that the type of brake on this car, L. & N. 12670, "is clearly illustrated by the photographs offered in evidence as defendents' Exhibits 10 (R. 125), 11 (R. 126), and 12 (R. 164)."

He also says on page 3 of his brief that the brake apparatus was equipped "with a ratchet wheel and pawl arrangement attached on the upper side of the brake platform." In describing his actions at the time of injury he says that after he climbed to the brake platform,

"He then placed his left foot against the **outer edge of the pawl** or 'dog' to engage it with the teeth of the ratchet wheel (R. 26, 86) and turned the wheel in a clockwise direction to tighten the brake (R. 26, 87). He continued to so turn the brake wheel until he had tension on the brake (R. 26, 29, 86, 87), and, as he did so, he kept his left foot against the pawl * * *." (Respondent's Brief, p. 3.)

The statement continues on page 4 of the brief as follows:

> "After respondent had tension on the brake, and while he still had his foot against the pawl and without any change, slipping or other movement of his body (R. 30, 32, 108) the pawl or 'dog' failed to hold the brake in position and to keep it from reversing (R. 108 * * *."

On page 5 respondent says that the inspection tests made the night and morning after the injury "failed to disclose any physical defect in the brake."

The photograph of the car L. & N. 12670 taken the morning after the injury (Defendants' Exhibit 10, facing R. 125) shows the brake staff marked 1, the ratchet wheel marked 3, which respondent testified was fastened to the brake staff, the dog or pawl marked 2, which respondent testified was fastened onto the iron plate on which the ratchet wheel marked 3 rested, and the safety guard marked 4 which is a part of the casting to which the dog or pawl was fastened and on which the ratchet wheel rested, this guard extending about an inch over the prongs of the ratchet wheel (R. 125, 126, 127). A brake platform with the iron plate or casting, the ratchet

wheel, the dog or pawl and the safety guard extending over the edge of the ratchet wheel, which was like the brake platform and appliances shown in the photograph of the car in question (Defendants' Exhibit 10), was described by the witnesses (R. 126, 127, 142, 143) and respondent in his brief, page 3. The safety guard over the ratchet wheel prevents the ratchet wheel from coming up and is one of the Government requirements (R. 143).

The undisputed physical facts show that the brake wheel could not have reversed because "either the ratchet came above the dog or the dog came above or below the ratchet," as respondent said in his statement made on March 3, 1938 (R. 102), and in his explanation of this statement made in his testimony at the trial on redirect examination (R. 106, 108) after the statement had been read in evidence (R. 102). He said in his statement (R. 105), "I don't know if any part of the brake was faulty or broken as a fact, but I know that it did not hold."

The respondent testified that "the brake staff extended through the ratchet wheel," that "the ratchet is fastened onto the brake staff" (R. 86, 108), that the dog or pawl "was a curved piece of iron or steel that had a hole through about the center of the length of it that fastened the dog onto this iron plate that the ratchet wheel rested on" (R. 86). He testified that each time he turned the brake wheel he heard the dog click in the ratchet wheel (R. 27, 87).

Each time the brake wheel was turned from left to right to tighten the brake, the point of the dog or pawl which meshed in the notches between the prongs of the ratchet wheel when pressure was applied to the dog or

pawl so as to hold the point against the revolving prongs of the ratchet wheel, had to clear the end of the prongs of the ratchet and as the brake wheel was turned from left to right, or clockwise, the point of the dog or pawl would have to be moved from the notch between the prongs so as to clear the end of the next prong of the ratchet before the pawl could go into mesh with the next notch of the ratchet wheel and at that time as the point of the pawl was passing over the point of the prong of the ratchet wheel the pawl is temporarily disengaged and could not hold the ratchet wheel or prevent the brake wheel from reversing. The plaintiff testified to this (R. 29) and so did a car inspector (R. 154), and unless the man using the brake kept his foot firmly pressed continuously against the dog or pawl and at the right place on the pawl so that the end of the pawl would move into the notch between the prongs of the rathchet wheel the instant the end of the pawl passed over the end of the prong, the brake wheel would reverse rapidly when the operator released or started to release his hold on the brake wheel after having turned it from left to right and when in the act of changing the position of his hands on the brake wheel in order to give it another turn from left to right. This is evidently what happened for the respondent said in his statement (R. 104), "and when I let loose of the wheel or started to let loose the wheel spun around and I could not let loose and it threw me to the left or east."

If the respondent had his left foot against the outer edge of the dog or pawl, as is stated in his brief, in order to press the point of the pawl against the ratchet wheel and cause it to mesh in the notches of the ratchet wheel as he turned the brake wheel he had to have his foot

pressing continuously against the forward portion of the curved or S shaped pawl, that is the portion nearest the car and between the bolt at the center, which fastened it to the iron trunnion or plate on which it rested, and the end of the pawl which meshed in the notches of the ratchet wheel, as he applied his strength in turning the brake wheel from left to right to tighten the brake and check the movement of the car. Wherever he placed his left foot against the dog or pawl, as he stood on the wet, sleety brake platform wearing rubbers on account of the weather, he had to keep his rubber clad foot pressed firmly against the dog or pawl at a point on the pawl so that the end of it would be firmly and continuously pressed against the prongs of the ratchet wheel as it turned, and if he released the pressure or shifted the position of his left foot even in a slight degree, the end of the dog would not be forced into the next notch of the ratchet wheel after being disengaged in passing over the adjoining prong of the ratchet wheel, and there would be nothing to hold the brake and the brake wheel when he released or started to release his hold on the brake wheel to get a new hold and the brake wheel would invitably reverse, as respondent testified (R. 29); if it did reverse as respondent says.

We are, of course, considering this testimony offered by the plaintiff, and not the positive testimony of the switch foreman (R. 269, 273) that the brake was securely set and the pawl was holding the ratchel wheel when plaintiff fell from the car.

The case of Spotts v. Baltimore & Ohio, 102 F. (2d) 160, on which the respondent seems to rely, was quite different from the case at bar. In that case the Court says that the

complaint charged that "defendant *negligently* failed to equip properly a certain car with an efficient brake wheel and brake staff, contrary to the provisions of the Safety Appliance Act, *negligently* provided a brake staff and wheel which fell to one side, when plaintiff attempted same, and *permitted the brake to be and remain in a defective and unsafe condition* contrary to the provisions of the Safety Appliance Act." (Emphasis ours.)

In this case plaintiff contended, and the state court ruled, that plaintiff was not required to allege or prove that defendants were negligent or that the brake was defective.

In that case, the plaintiff did not allege a right to recover under the Federal Employers' Liability Act. In this case the plaintiff expressly based his right to recover under the provisions of the Federal Employers' Liability Act. (R. 3.)

The petitioners believe that the differences that exist between the provisions of the Act of April 14, 1910, in relation to hand brakes, and the provisions of prior Safety Appliance Acts relating to automatic couplers and other appliances not requiring the exercise of human effort, the difference between the operation of automatic couplers, which are required in order that men will not have to go between the ends of cars and exert any human effort in coupling cars, while the use of hand brakes necessarily requires the careful and constant exercise of human effort in their operation, and the fact this court has never ruled on these questions which relate directly to railroad operation over the entire country, fully justify the consideration of this court to determine whether an employee can recover for injuries while using a hand brake without alleging or proving or requiring the jury to find that the hand brake was defective or out of repair.

III.

The plaintiff (respondent) alleged he was injured because of the failure of the defendants (petitioners) to have the car equipped with hand brake in accordance with the orders and regulations of the Interstate Commerce Commission. Section 3 of the Act of April 14, 1910 (Sec. 12, Title 45, U. S. Code), expressly provides that the standards fixed by the Interstate Commerce Commission shall be the standards of equipment required by the Act, and compliance with those orders and regulations and the equipping of a car with a hand brake which conforms to the standards fixed by the Commission, is all that is required by the Act. The respondent wholly failed to prove and the jury was not required to find from the evidence that the hand brake respondent was operating or attempting to operate did not comply with the orders and regulations of the Commission. This was an essential part of respondent's pleading and an essential fact to be proved by the respondent and found by the jury, but it was entirely ignored by the state court. It is a federal question of substance not heretofore determined by this court, and for this reason it should, it would seem, be reviewed by this court.

The respondent does not cite any decision of this court on this question and presents no valid reason for refusal by this court to review the question.

In the Spotts case (102 F. [2d] 160) cited and relied on by respondents, the defendant carrier there proved and seems to have relied upon the fact that the type of brake involved in that case was used by the Railroad Administration during the previous World War and that at the close of the Railroad Administration 500 cars so equipped were

delivered to defendant, and defendant insisted that the order of the Interstate Commerce Commission of March 13, 1911, specifying that cars should be equipped with "hand brakes of an efficient design," was an approval of the hand brake in use on the car involved in that case.

The Court of Appeals at page 163 of 102 F. (2d) says: "The order of the Interstate Commerce Commission is merely a direction to comply with the statute requiring an 'efficient hand brake'." On the same page the Court says, "Here the Commission has prescribed merely any 'efficient hand brake'; it has included no specific requirements and fixed no standard as filling the demands of 'efficiency'."

It is manifest that the Circuit Court of Appeals in that case was not fully informed as to the scope of the order of the Interstate Commerce Commission or it would never have said that the Commission "has included no specific requirements and fixed no standard as filling the demands of 'efficiency'."

As a matter of fact and as that court ought to have known, for courts take judicial notice of the orders of the Interstate Commerce Commission, the Commission *had* included specific requirements and *had* fixed standards filling the requirements for an efficient hand brake.

Those specific requirements and fixed standards are set forth in 2 Roberts Federal Liabilities of Carriers, Second Edition, pages 2010, 2011 and 2012 and for the convenience of the Court they are here set forth as follows:

SAFETY APPLIANCE STANDARDS
BOX AND OTHER HOUSE CARS

Handbrakes

Number:

Each box or other house car shall be equipped with an efficient handbrake which shall operate in harmony with the power-brake thereon.

The handbrake may be of any efficient design, but must provide the same degree of safety as the design shown on Plate A.

Dimensions:

The brake-shaft shall be not less than one and one-fourth (1¼) inches in diameter, of wrought iron or steel without weld.

The brake-wheel may be flat or dished, not less than fifteen (15), preferably sixteen (16) inches in diameter, of malleable iron, wrought iron or steel.

Location:

The handbrake shall be so located that it can be safely operated while car is in motion.

The brake-shaft shall be located on end of car, to the left of and not less than seventeen (17) nor more than twenty-two (22) inches from center.

Manner of Application:

There shall be not less than four (4) inches clearance around rim of brake-wheel.

Outside edge of brake-wheel shall be not less than four (4) inches from a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill.

Top brake-shaft support shall be fastened with not less than one-half (½) inch bolts or rivets.

A brake-shaft step shall support the lower end of brake-shaft. A brake-shaft step which will permit the brake-chain to drop under the brake-shaft shall not be used. U-shaped form of brake-shaft step is preferred.

Brake-shaft shall be arranged with a square fit at its upper end to secure the handbrake wheel; said square fit shall be not less than seven-eighths (⅞) of an inch square. Square-fit taper; nominally two (2) in twelve (12) inches.

Brake-chain shall be of not less than three-eighths (⅜), preferably seven-sixteenths ($\frac{7}{16}$), inch wrought iron or steel, with a link on the brake-rod end of not less than seven-sixteenths ($\frac{7}{16}$), preferably one-half (½), inch wrought iron or steel, and shall be secured to brake-shaft drum by not less than one-half (½) inch hexagon or square-headed bolt. Nut on said bolt shall be secured by riveting end of bolt over nut.

Lower end of brake-shaft shall be provided with a trunnion of not less than three-fourths (¾), preferably one (1), inch in diameter extending through brake-shaft step and held in operating position by a suitable cotter or ring.

Brake-shaft drum shall be not less than one and one-half (1½) inches in diameter.

Brake ratchet-wheel shall be secured to brake-shaft by a key or square-fit; said square-fit shall be not less than one and five-sixteenths ($1\frac{5}{16}$) inches square. When ratchet-wheel with square-fit is used provision shall be made to prevent ratchet-wheel from rising on shaft to disengage brake-pawl.

Brake rachet-wheel shall be not less than five and one-fourth (5¼), preferably five and one-half (5½), inches in diameter and shall have not less than fourteen (14), preferably sixteen (16), teeth.

If brake ratchet-wheel is more than thirty-six (36) inches from brake-wheel, a brake-shaft support shall be provided to support this extended upper portion of brake-shaft; said brake-shaft support shall be fastened with not less than one-half (½) inch bolts or rivets.

The brake-pawl shall be pivoted upon a bolt or rivet not less than five eighths (⅝) of an inch in diameter, or upon a trunnion secured by not less than one-half (½) inch bolt or rivet, and there shall be a rigid metal connection between brake-shaft and pivot of pawl.

Brake-wheel shall be held in position on brake-shaft by a nut on a threaded extended end of brake-shaft; said threaded portion shall be not less than three-fourths (¾) of an inch in diameter; said nut shall be secured by riveting over or by the use of a lock-nut or suitable cotter.

Brake-wheel shall be arranged with a square-fit for brake-shaft in hub of said wheel; taper of said fit, nominally two (2) in twelve (12) inches.

Brake-Step.

If brake-step is used it shall be not less than twenty-eight (28) inches in length. Outside edge shall be not less than eight (8) inches from face of car and not less than four (4) inches from a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill.

Manner of Application:

Brake-step shall be supported by not less than two metal braces having a minimum cross-sectional area three-eighths (⅜) by one and one-half (1½) inches or equivalent, which shall be securely fastened to body of car with not less than one-half (½) inch bolts or rivets.

We repeat what has already been said, that there is not a word of evidence in the entire record that the hand brake failed in any particular to comply with these requirements of the Interstate Commerce Commission. We believe the Court in this case should say as it said in the Scarlett case, that when the carrier has complied with the requirements of the Interstate Commerce Commission, then neither plaintiff nor Court nor jury can be allowed to say that the hand brake was defective or not efficient or that the defendants did not perform their duty under the Safety Appliance Act and the orders, rules and regulations of the Interstate Commerce Commission. That certainly should be the ruling when plaintiff, as in this case, having on rubbers and chamois skin gloves fell from the wet brake platform on a rainy, sleety night, and when each time he turned the brake wheel he heard the dog or pawl click in the ratchet wheel, which showed that the dog was holding the brake, and when he stated that he did not know of any defect in the hand brake, that when he let loose or started to let loose of it, it suddenly spun and reversed and he could not let go of it.

In Illinois Central R. Co. v. Williams, 242 U. S. 462, the plaintiff recovered judgment for injuries received "when the handhold or grab iron placed at the top of the ladder, and required to be fastened securely to the roof of the car, gave way, causing him to fall to the ground and sustain injuries."

On page 464 the Court says:

> "A box car could not properly be used without a secure ladder, and since, by its terms, all cars having ladders must be equipped with secure handholds, the

> application of this section * * * to the case at bar, the neglect of its requirements, and the liability of the defendants to the plaintiff for the result to him of such **neglect**, are too clear for discussion." (Emphasis ours.)

The Court then states the provision of the Act requiring the Interstate Commerce Commission to "designate the number, dimensions, location and manner of application of the appliances," and says (page 465) that "**a failure to conform its equipment to such standards** shall subject the **neglecting** carrier to like penalty as failure to comply with any requirement of the act." (Emphasis ours.)

The Court also says:

> "Pursuant to the command of this 3rd section, the Interstate Commerce Commission on March 13, 1911, issued an order designating 'the number, dimensions, sizes and manner of application of the appliances provided for by section 2 of the act' (which included hand brakes), and specifically describing the size, character, and location of ladders on 'freight-train cars' and of handholds to be maintained at the tops of such ladders, and of hand brakes also."

And yet, notwithstanding what this Court said in that case, the Circuit Court of Appeals in the Spotts case say that the Interstate Commerce Commission has not made such designation and has not fixed any standard.

In Atchison, Topeka & Santa Fe Ry. Co. v. Scarlett, 300 U. S. 471, the plaintiff sued for damages for an alleged violation of the Federal Safety Appliance Act (Act of April 14, 1910, c. 160, Sections 2 and 3, 36 Stat. 298), which is the same act under which the respondent in this action sued.

The Court, at page 472, said:

> "The ladder itself was not defective. In its structure it complied with the regulations of the Interstate Commerce Commission made in pursuance of the act, 'United States Safety-Appliance Standards'—order of March 13, 1911. It is unnecessary to set forth these regulations. The only one important here prescribes—'Minimum clearance of treads, (shall be) two (2), preferably two and one-half (2½) inches'."

The Court, at page 474, says:

> "In the light of the long-continued use of brace rods of the type here in question in the same relation to the ladder as in the case here, we may fairly presume that the Interstate Commerce Commission in the performance of its duties was aware of the situation, and knowingly permitted its rule in respect of the ladder clearance to remain without change. Compare Pennell v. Philadelphia & Reading Ry., 231 U. S. 675, 680. The regulation having been made by the Commission in pursuance of constitutional statutory authority, it has the same force as though prescribed in terms by the statute. And the railroad company having strictly complied with the regulation has discharged its full duty so far as the ladder requirement of the Safety Appliance Act is concerned. The judgment of the trial court and jury cannot be substituted for that of the commission."

In Chicago Great Western R. Co. v. Rambo, 298 U. S. 99, the plaintiff sued to recover damages for death alleged to have been the result of a violation of the Federal Boiler Inspection Act. This court on writ of certiorari reviewed the judgment of the Supreme Court of Minnesota. The Court, at page 100, says:

> "Several acts of negligence were alleged, but the

trial court submitted only one to the jury: Failure to equip the locomotive with a headlight of the illuminating power required by Federal law."

On page 101 the Court says:

"In cases like this, we must examine the record and determine for ourselves whether as a matter of law there is enough evidence to sustain a finding of **negligence** (citing cases)." (Emphasis ours.)

On page 102 the Court stated the evidence as contained in the opinion of the state court and says:

"This apprizement of the evidence, we think, is not well founded. Properly interpreted, the record fails to establish that the headlight fell below the prescribed standard. The argument for respondent dwells too hard on conjecture (citing cases)."

The evidence of the engineer of the locomotive and of another witness tended to show that the headlight was not sufficient to properly illuminate the track 800 feet ahead. The Boiler Inspection Act authorized the Interstate Commerce Commission to prescribe rules and regulations fixing the standards necessary to constitute compliance with this Safety Appliance Act and the Commission by its Rule 129 prescribed the standard (298 U. S. loc. cit. 100).

The Court, at page 105, says:

"Nothing in all this gives substantial support to the notion that the headlight failed to illuminate the track 800 feet ahead, or was below the **required standard."**

The respondent is entirely mistaken when he says (page 17, Respondent's Brief), "The petitioners here do not contend, and cannot contend, that there was no proof of the inefficiency of the hand brake here involved."

It is surprising that counsel for respondent would make that statement, for the petitioners in paragraph 3 of Reasons Relied on for Allowance of the Writ (page 12), say, "3. The state court erred in holding that the plaintiff was entitled to recover * * * for the reason that there was no evidence that the hand brake equipment failed in any particular to comply with the rules, orders or regulations of the Interstate Commerce Commission * * *." The same contention is made by the petitioners in their brief at page 33.

It is a well established rule of construction of statutes that the intention of Congress is to be determined by a consideration of all the parts and provisions of an act, and the Act of April 14, 1910, should be construed in accordance with that rule, while Section 2 of that act (section 11, Title 45, U. S. Code) says, "All cars must be equipped with * * * efficient hand brakes," section 3 of the act (section 12, Title 45, U. S. Code) says:

> "The number, dimensions, location and manner of application of the appliances provided for by sections 4 and 11 of this chapter as designated by the Interstate Commerce Commission shall remain as the standards of equipment to be used on all cars subject to the provisions of this chapter * * *."

The plaintiff's petition charged that defendants (petitioners) were liable on the ground that they had failed to comply with the requirements of the statute and "the orders, rules and regulations of the Interstate Commerce Commission of the United States made and promulgated

pursuant thereto, in such cases made and provided to have said box car equipped with an efficient hand brake."

Of course this becomes unimportant and is answered if the contention of the petitioners be correct that they are entitled to the immunity claimed under the Federal Employers' Liability Act and the Safety Appliance Act of April 14, 1910, in that the petition does not state a cause of action against them as a railroad carrier because it does not allege that plaintiff was injured "by reason of any **defect or insufficiency, due to its** (petitioners') **negligence, in its cars,**" and does not base the right to a judgment against petitioners on the ground that they were **using** a car "not equipped as provided in this chapter" (Appendix to petition and brief, pp. 47 and 48), which is the only offense made punishable or penalized by the statute, but only charges that plaintiff's injury "directly and proximately resulted from defendants' **failure to perform their duty * * * to have said box car equipped** with an efficient hand brake" (R. 3).

The record in this case shows not only that the respondent failed to prove that the hand brake did not conform to the standards fixed by the Interstate Commerce Commission and that his injuries "directly and proximately resulted from defendants' failure to perform their duty under * * * the orders, rules and regulations of the Interstate Commerce Commission," as he alleged twice in his petition (R. 3), but that the hand brake was not defective and did comply with the standards fixed by the Commission, under the authority and command of the Act of April 14, 1910, and for this reason the judgment of the state court should be reviewed by this Court in the exercise of its sound judicial discretion.

IV.

The respondent is mistaken in his contention that, although he bases his case and his right to recover upon the Federal Employers' Liability Act, as he had to do in order to maintain a suit in the courts, he can evade and ask the Court to ignore the provision of that act which make the carrier liable and give respondent a right to recover in this case only by pleading, proof and finding by the jury that his injury when he fell from the car was caused by some "defect or insuffiency, **due to its** (petitioners') **negligence, in its cars.**"

This Court has in numerous cases held that proof of negligence and a defect in the equipment are essential in a suit based upon the Federal Employers' Liability Act, as this case is necessarily based.

In Seaboard Air Line Ry. Co. v. Horton, 233 U. S. 492, the Court reversed the judgment of the Supreme Court of North Carolina which affirmed a judgment in favor of the plaintiff in an action brought under the Federal Employer's Liability Act. The Court quoted the provisions of the Act giving a right of action for injury received by an employee "resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, tracks, roadbed, work, boats, wharves, or other equipment."

The Court at page 501, after quoting this provision of the Act said:

> "This clause has two branches; the one covering the negligence of any of the officers, agents, or em-

ployees of the carrier, which has the effect of abolishing in this class of cases the common-law rule that exempted the employer from responsibility for the negligence of a fellow employee of the plaintiff; and the other relating to defects and insufficiencies in the cars, engines, appliances, etc. But, plainly, with respect to the latter as well as the former ground of liability, it was the intention of Congress to base the action upon negligence only, and to exclude responsibility of the carrier to its employees for defects and insufficiencies not attributable to negligence. The common-law rule is that an employer is not a guarantor of the safety of the place of work or of the machinery and appliances of the work; the extent of its duty to its employees is to see that ordinary care and prudence are exercised to the end that the place in which the work is to be performed and the tools and appliances of the work may be safe for the workmen. (Citing cases.) To hold that under the statute the railroad company is liable for the injury or death of an employee resulting from any defect or insufficiency in its cars, engines, appliances, etc., however caused, is to take from the act the words 'due to its negligence'. The plain effect of these words is to condition the liability upon negligence; and had there been doubt before as to the common-law rule, certainly the act now limits the responsibility of the company as indicated. The instructions above quoted imposed upon the employer an absolute responsibility for the safe condition of the appliances of the work, instead of limiting the responsibility to the exercise of reasonable care. In effect, the jury was instructed that the absence of the guard glass was conclusive evidence of defendants' negligence. In this there was error."

The Court then considered the provisions of the Federal Employer's Liability Act providing that the employer

could not defend on the ground of assumption of risk or contributory negligence of the employee "in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

The decision of this Court in the Horton case was rendered on April 27, 1914, more than four years after the enactment of the Safety Appliance Act of April 14, 1910, relating to hand brakes and ladders on cars. The Court had before it in this decision the Act of April 14, 1910, chap. 103, 36 Stat. at L. 913, for on page 503 the Court, after quoting the provisions pertaining to assumption of risk and contributory negligence, says:

> "By the phrase 'any statute enacted for the safety of employees,' Congress evidenctly intended Federal statutes, such as the safety appliance acts (27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174; 32 Stat. at L. 943, chap. 976, U. S. Comp. Stat. Supp. 911, p. 1314; 36 Stat. at L. 298, chap. 160, U. S. Comp. Stat. Supp. 911, p. 1327; id. 913, chap. 103, U. S. Comp. Stat. Supp. 911, p. 1333), and the hours of service act (34 Stat. at L. 1415, chap. 2939, U. S. Comp. Stat. Supp. 1911, p. 1321). For it is not to be conceived that, in enacting a general law for establishing and enforcing the responsibility of common carriers by railroad to their employees in interstate commerce, Congress intended to permit the legislatures of the several states to determine the effect of contributory negligence and assumption of risk, by enacting statutes for the safety of employees, since this would in effect relegate to state control two of the essential factors that determine the responsibility of the employer.
>
> "It seems to us that section 4, in eliminating the defense of assumption of risk in the cases indicated,

quite plainly evidences the legislative intent that in all other cases such assumption shall have its former effect as a complete bar to the action. And, taking sections 3 and 4 together, there is no doubt that Congress recognized the distinction between contributory negligence and assumption of risk; for, while it is declared that neither of these shall avail the carrier in cases where the violation of a statute has contributed to the injury or death of the employee, there is, with respect to cases not in this category, a limitation upon the effect that is to be given to contributory negligence, while no corresponding limitation is imposed upon the defense of assumption of rick—perhaps none was deemed feasible."

The Safety Appliance Act of April 14, 1910, upon which the respondent in the case at bar bases his action, is enumerated in the above quotation as "id. 913, chap. 103," that is 36 Statutes at Large, page 913, chapter 103. The decision of this Court in Seaboard Air Line Railroad Co. v. Horton, has never been overruled and has been cited as authority in many cases, as recently as twice in 305 U. S. at page 2 and page 3. It is the law of the land which controls and should be applied in the case at bar.

The Federal Locomotive Boiler Inspection Act (Act of February 17, 1911, Chap. 103, 36 Stat. at L. 913, 45 U. S. Code sections 22 to 34) is a Safety Appliance Act as this court stated in Great Northern Railway Co. v. Leonidas, 305 U. S. 1, 2.

The Horton case is cited by the Court in Southern Ry. Co. v. Gray, 241 U. S. 333, a suit under the Federal Employers' Liability Act, and the Court, at page 339, says, **"Negligence by the railway company is essential to a recovery * * *."**

Since the ruling of this court in seaboard Air Line Railway Co. v. Horton, 233 U. S. 492, in 1914, the Congress has been in session many times and for many years, but it has not made any change in the provisions of the Federal Employers' Liability Act or the Safety Appliance Act of April 14, 1910, as those acts were interpreted by this court in that case. This "amounts to a confirmation" of the judicial interpretation placed upon the acts by this court in that case. McFeely v. Commissioner of Internal Revenue, 296 U. S. 102, 108.

In Jacobs v. Southern Ry. Co., 241 U. S. 229, the Court, at page 235, in considering the Federal Employers' Liability Act in a suit by a fireman injured in attempting to get on an engine, says, "It is clear, therefore, that the assumption of risk as a defense is abolished only *where the negligence of the carrier is in violation of some statute enacted for the safety of employees.* In other cases, therefore, it is retained. And such is the ruling in the Horton case (Seaboard Air Line R. Co. v. Horton, 233 U. S. 492), *made upon due consideration and analysis of the statute* and those to which it referred." (Emphasis added.)

In Spokane & I. E. R. Co. v. Campbell, 241 U. S. 497, the Court at page 509 quotes the provision of the Federal Employers' Liability Act imposing a liability for injury to an employee "resulting in whole or in part * * * by reason of any defect or insufficiency *due to its negligence in its cars* * * *." The Court at page 510 says, "As was held in San Antonio & A. Pass. R. Co. v. Wagner, 241 U. S. 476, a violation of the safety appliance act is '*negligence*' within the meaning of the liability act."

In St. Louis-San Francisco Railway Co. v. Mills, 271 U. S. 344, the plaintiff, respondent, sued to recover under the Federal Employers' Liability Act. The Court at page

347 says: "The burden of proving negligence rested upon the respondent."

At page 348, the Court says: "The evidence must at least point to the essential fact which the jury is required to find in order to sustain the verdict."

In Atlantic Coast Line Rd. Co. v. Burnette, 230 U. S. 199, the plaintiff commenced suit on January 7, 1910, for injuries received while employed by the defendant railroad in interstate commerce on October 5, 1907, the Supreme Court of North Carolina held that the railroad company could not rely on the limitation of two years in the Federal Employers Liability Act because of "want of a plea setting it up."

This Court reversed the judgment of the State Supreme Court and at page 200 said:

> "It would seem a miscarriage of justice if the plaintiff should recover upon a statute that did not govern the case, in a suit that the same act declared too late to be maintained. A right may be waived or lost by a failure to assert it at the proper time (citing case); but when a party has meant to insist on all the right it might have, such a result would be unusual and extreme."

The Court, at page 201, also said:

> "In dealing with the enactments of a paramount authority, such as Congress is, within its sphere, over the states, we are not to be curious in nomenclature if Congress has made its will plain, nor to allow substantive rights to be impaired under the name of procedure (citing case). But, irrespective of the fact that the act of Congress is paramount, when

> a law that is relied on as a source of an obligation in tort sets a limit to the existence of what it creates, other jurisdictions naturally have been disinclined to press the obligation farther (citing cases). There may be especial reasons for regarding such obligations imposed upon railroads by the statutes of the United States as so limited (citing cases). At all events the act of Congress creates the only obligation that has existed since its enactment in a case like this, whatever similar ones formerly may have been found under local law emanating from a different source (citing cases). If it be available in a state court to found a right, and the record shows a lapse of time after which the act says that no action shall be maintained, the action must fail in the courts of a state as in those of the United States."

The Court of Appeals in the Spotts case (102 F. [2d] 160) cites Philadelphia & R. R. Co. v. Auchenbach, 16 F. (2d) 550, in support of the point on which the Spotts case was decided and on which respondent in the case at bar relies, namely, "The test in fact is the performance of the appliance." In the Auchenbach case the plaintiff alleged and the case was submitted on the charge that the railroad company was **negligent** in violating the Safety Appliance Act relating to **automatic couplers.** The Circuit Court of Appeals (16 F. [2d], page 552) said:

> "The defendant's **negligence,** if any, consisted in violating a duty imposed by statute. The statute made it obligatory upon the defendant to equip its cars with safety appliances of a kind defined by their operation, namely, **couplers that will couple automatically by impact.** That duty is absolute and unqualified and contemplates the maintenance of such appliances in working condition 'at all times' (citing case). The test of the observance of this duty is the performance of the appliances." (Emphasis ours.)

The Court of Appeals then, in quotations, says:

> "The failure of a **coupler** to work at any time sustains a charge that the Act has been violated."

The Court (page 552) then cites five cases decided by this Court to support its conclusions, none of which involved the use of hand brakes.

In St. Louis I. M. & S. R. Co. v. Taylor, 210 U. S. 281, the Court said:

> "The right to recover for the death was based solely on the failure to equip the two cars which were to be coupled with such drawbars as were required by the act of Congress known as the safety appliance law. 27 Stat. at L. 531, Chap. 196."

That law was the automatic coupler law, passed March 2, 1893, which required that cars be "equipped with **couplers coupling automatically by impact**, and which can be **uncoupled without the necessity of men going between the ends of the cars.**"

The case of Chicago, B. & Q. R. Co. v. United States, 220 U. S. 559, was a suit for penalty under the Act of March 2, 1893, and the Act of March 2, 1903, for using cars not equipped with **air** brakes. This Court quoted with approval the ruling of the trial court that the carrier was liable, "provided the accident occurs from a **defective appliance** such as is described in this act."

This court also quoted from the opinion of the Circuit Court of Appeals as follows:

> "The cause is simplified by the concession of counsel for the railway company that there was

evidence tending to prove the **defective condition** of each of the four cars."

The Court of Appeals cited the Taylor case (210 U. S. 281) on the point that under the statute there in question the duty was an absolute one "and not one which is discharged by the exercise of reasonable care or diligence." That statute is the same one, which requires automatic couplers, and the Court bases its decision on the provisions of that Act. (Act of March 2, 1893.) The Court (220 U. S. l. c. 571-575) cites, quotes and follows the Taylor case.

In San Antonio & Arkansas R. Co. v. Wagner, 241 U. S. 476, plaintiff sued for injuries received in **coupling cars**, charging that the "couplers would not couple automatically by impact, as required by law," the Act of March 2, 1893, as amended by the Act of March 2, 1903.

In Chicago, R. I. & P. Ry. Co. v. Brown, 229 U. S. 317, the suit was for injuries received under the automatic coupler law.

In Minneapolis & St. L. R. Co. v. Gotschall, 244 U. S. 66, the suit was under the automatic coupler law and the petition alleged *negligence* of defendant. The jury, *under an instruction of the Court, was permitted to infer negligence* on the part of the company from the fact that the coupler failed to perform its function, there being *no other proof of negligence*." Citing the Taylor case.

This Court in Chicago, M. & St. P. R. Co. v. Coogan, 271 U. S. 472, an action for damages under the Federal Employers' Liability Act, said:

"At the close of all the evidence, petitioner moved the Court to direct a verdict in its favor on the ground, among others, that respondent had failed to prove any actionable negligence on the part of petitioner, and that any verdict for respondent would be based upon speculation and conjecture."

"Judgment for respondent was given by the trial court, and, on appeal, it was affirmed in the highest court of the state, 160 Minn. 411, 200 N. W. 477. The case is here on writ of certiorari. Judicial Code, sec. 237."

"Petitioner contends that the evidence is not sufficient to sustain a finding that any negligence on its part cause or contributed to cause the death."

On page 474, the Court says:

"By the Federal Employers' Liability Act, Congress took possession of the field of employers' liability to employees in interstate transportation by rail; and all state laws upon that subject were superceded. (Citing cases.) The rights and obligations of the petitioner depend upon that act and applicable principles of common law as interpreted by the Federal courts. The employer is liable for injury or death resulting in whole or in part from the negligence specified in the act; and proof of such negligence is essential to recovery. The kind or amount of evidence required to establish it is not subject to the control of the several states. This Court will examine the record, and if it is found as a matter of law, the evidence is not sufficient to sustain a finding that the carrier's negligence was a cause of the death, judgment against the carrier will be reversed." (Citing cases.)

In Atchison, Topeka & Santa Fe Ry. Co. v. Scarlett, 300 U. S. 471, which cited and relied on by the Court in the Spotts case (102 F. [2d] l. c. 163) says "Plaintiff relies

on," the plaintiff "alleged that the injury was due to the negligence of the railway company." At the trial plaintiff abandoned his claim based upon negligence in having a brace rod on the side of a car adjacent to the side ladder, and "put his case wholly on the ground that the round diagonal brace rod and the ladder combined to constitute an unsafe appliance within the meaning of the act, and that, in consequence, the liability of the railway company was absolute." This court held that there was no violation of the act relating to hand holds and side ladders.

That the decision in the Spotts case is based upon decisions in cases under the automatic coupler law is shown not only by the fact that the cases which that court cited and relied upon arose under the coupler law, but the Court clearly shows that it was following the ruling in automatic coupler cases for at page 162 of 102 (2d), it says:

> "Proof of an actual break or visible defect **in a coupling** appliance is not a prerequisite to a finding that the statute has been violated." (Emphasis added.)

The case of St. Louis I. M. & S. R. Co. v. Taylor, 210 U. S. 281, cited as an authority for the decision in the Spotts case, and the basis for the rulings in the state and lower federal court cases cited and relied upon by respondent, was argued and submitted on April 14, 1908, two years before the hand brake law was enacted on April 14, 1910, and was for injuries alleged to have resulted from a failure to have a car equipped with a proper draw bar, a violation of the automatic coupler act.

The respondent apparently would have the Court believe that the petitioners (defendants) adopted and accepted the theory of the respondent (plaintiff) that he was

entitled to recover even though the brake was not defective. (Respondent's Brief in Opposition, pp. 6, 7.)

The record presented with the petition for the writ (pp. 8, 9) shows that the petitioners (defendants) at the very commencement of the trial on the voir dire examination of the jury, contended that they were not liable if the jury did not find the injury was caused by a defect in the brake. The respondent (plaintiff) objected to that statement and contended he was not required to prove any defect, but simply that the brake "didn't operate" (R. 8, 9). The trial court sustained the plaintiff's objection and contention and the defendants had no alternative but to conform their defense to the rulings of the Court. The respondent in his brief inadvertently overlooked this important incident and ruling at the trial.

The position and contention of the respondent (plaintiff) and the theory of the lower court on which the case was tried is shown by the opening statement of counsel for plaintiff (R. 14) where counsel said: "We don't attempt to show and there will be no attempt to show in this case that the company is guilty of negligence."

The plaintiff's petition (R. 2, 3, 4) did not charge that there was any negligence on the part of the defendants (petitioners) and they objected at the outset to the introduction of any evidence for the reason that the petition "fails to state facts sufficient to constitute a cause of action." (R. 22.) The Court overruled the objection and the defendants excepted. (R. 22.)

At the close of plaintiff's evidence (R. 112, 113) the defendants requested the Court to instruct the jury that

under the pleadings and the evidence the plaintiff was not entitled to recover. The Court refused to give this instruction and the defendants excepted. (R. 113.)

At the close of all the evidence (R. 310, 311) the defendants (petitioners) again requested the Court to instruct the jury that under the pleadings and the evidence the plaintiff was not entitled to recover, which instruction the Court refused to give and the defendants saved their exceptions. (R. 311.)

The rule is so well established as not to require citation of cases that when a court has ruled adversely to the contention of one of the parties, he does not waive his objection or adopt the adversary's theory by making the best defense he can under the adverse ruling of the Court or by submitting the converse of the theory upon which the other party submits his case.

V.

The respondent contends that the decision of the state court is not in conflict with the latest decision of a Federal court on the proper interpretation and application of the Safety Appliance Act of April 14, 1910, and bases this contention on two grounds. One is that the decision in Grand Trunk Western R. Co. v. Holstein, 6 Cir., 67 F. (2d) 780, is based upon a discrepancy between a statement made by the injured employee and his testimony at the trial. The other ground is that the Holstein case is not the latest decision on that question for the reason that the Seventh Circuit Court of Appeals in the more recent case of Spotts v. Baltimore & Ohio R. Co., 102 F. (2d) 160, has decided the question in a way

different from the decision of the Sixth Circuit Court of Appeals in the Holstein case, 67 F. (2d) 780.

The respondent seeks to distinguish and discount the decision in Grand Trunk R. Co. v. Holstein, 67 F. (2d) 780, by saying that the decision is based upon and justified by a discrepancy between a statement made by the employee Holstein soon after his injury and his testimony on the trial.

The record in this case (R. 102, 103, 104) shows that the respondent in this case made a statement soon after his injury which is as much at variance with the evidence as to the admitted physical facts as was the situation in the Holstein case, and if the decision in that case reversing the judgment is based upon that variation, as the respondent here contends it was and ought to have been, then it would seem that the judgment in this case ought to be reversed. In the statement of respondent made March 3, 1938, within two weeks after the injury, he said (R. 103, 104):

> "Either the ratchet came above the dog (pawl) or the dog (pawl) came above the ratchet, at least it did not hold."

With the testimony of the plaintiff describing the hand brake equipment as he did at the trial (R. 27, 28, 29, 85, 86), and the statement in respondent's brief (page 3), that the photograph of the car taken the morning after the injury and offered in evidence as Defendants' Exhibit 10 (R. 125) clearly illustrates the hand brake and the description in the brief of the brake equipment, it seems quite apparent that there was as great variation between plaintiff's statement and his testimony in this case as

there was in the Holstein case. We wish to say, however, that we do not concede that the decision in that case was based upon such variation. The decision was clearly based upon a failure to prove that the brake was defective.

The difference between this case and the case of Spotts v. Baltimore & Ohio, 102 F. (2d) 160, on which the respondent relies, is vital in several particulars. In that case, as the Court says, the complaint charged that "defendant **negligently** failed to equip properly a certain car with an efficient brake wheel and brake staff, contrary to the provisions of the Safety Appliance Act, **negligently** provided a brake staff and wheel which fell to one side, when plaintiff attempted same, and permitted the brake to be and remain in a **defective and unsafe condition** contrary to the provisions of the Safety Appliance Act."

In this case respondent contended and the state court ruled that plaintiff was not required to allege or prove that defendants were negligent or that the brake was defective.

In that case, the plaintiff did not allege a right to recover under the Federal Employers' Liability Act. In this case the plaintiff expressly based his right to recover under the provisions of the Federal Employers' Liability Act (R. 3), and he could not maintain an action in the courts of Missouri without basing his right to recover upon the Federal Employers' Liability Act.

The opinion in the Spotts case shows that the Circuit Court of Appeals based its decision upon the rule applied in cases arising under the automatic coupler law, for the Court in that case at page 162 of 102 F. (2d) says:

> "Proof of an actual break or visible defect in a **coupling appliance** is not a prerequisite to a finding that the statute has been violated." (Emphasis ours.)

The decision of that Court in that case is certainly not binding on this Court in considering whether the decision of the state court should be reviewed on writ of certiorari.

The Court of Appeals in the Spotts case cited and followed the case of Didinger v. Pennsylvania R. Co., 39 F. (2d) 798, but overlooked the later case of Grand Trunk W. R. Co. v. Holstein, 67 F. (2d) 780, which should have been followed in the Spotts case because it was the latest decision of any Federal court.

Even a casual reading of the opinion in the Spotts case shows that it wholly fails to distinguish between the Automatic Coupler Act of March 2, 1893, which requires that cars be equipped with couplers coupling automatically by impact and operate mechanically and without the aid or use of manual energy, and was enacted for the express purpose of preventing human effort and intervention, and the hand brake law of April 14, 1910, which requires that cars be equipped with hand brakes, which can **only** be operated and made effective by manual effort applied by men, who vary in energy, strength, alertness and intelligence, no two of whom possess in equal degree these personal qualities and qualifications. It was because of the knowledge which Congress had of the variation in these qualities and qualifications which different men possess, and the knowledge that the efficient operation of hand brakes depended upon the possession and exercise of these qualities and qualifications by the vast num-

ber of individuals employed as switchmen and brakemen on the hundreds of railroads in this country, that caused Congress to express in the hand brake law, **as it did not express in the automatic coupler law,** the intention that the hand brake law should only apply where and when the equipment was defective. This understanding and intention is expressed in five places in one section and once in another section of the act, whereas the automatic coupler law dealing only with mechanical equipment not requiring the intervention of human agency and energy to make it effective, makes no mention of or reference to defective or out of repair condition of the lifeless materials which constitute automatic couplers and can cause them to couple automatically by impact wholly without the use of human energy, strength, alertness and intelligence, the essential human elements necessary in the efficient operation of hand brakes.

In considering whether the Court ought to review the record and consider the case on its merits in order to determine whether the judgment of the State Court should stand, it seems pertinent and important to call attention to some of the facts which shed a very definite light on the question whether plaintiff proved that **the brake** was either defective or inefficient.

The accident was at night. It was raining and sleeting (R. 27, 87, 104). The brake platform and the brake appliances were wet. Plaintiff had rubbers on his feet and chamois skin gloves or mittens on his hands. He was tightening the brake on the car by turning the brake wheel from left to right. He had tightened the brake until he had taken the slack out of the brake chain and had tension of the brake shoes against the car wheels. He was making an effort to check the movement of the

car by applying his strength to the brake wheel to overcome the momentum of the car moving down grade to the south and the force of the locomotive and twelve cars it was pushing against the L. & N. car 12670. To apply his strength to the brake wheel to turn it from left to right or clockwise, he naturally had to brace himself to his left and against his left foot.

We trust and believe that we do not reflect upon the decisions of the courts, we certainly do not intend to, when we say that we believe the courts in their decisions have entirely overlooked the difference between the provisions of the Automatic Coupler Law and the provisions of the Hand Brake Law and have wholly overlooked the reason and purpose Congress had in making a difference in the provisions of these two laws, and the reasons why the courts should make a distinction in the interpretation and application of the two laws.

The petitioners fully realize that in passing upon and granting a petition for a writ of certiorari, the Court is not determining the questions which are made the grounds for the petition, and they do not mean to present this question now to the Court as for a final determination, but they do believe that this question is such as to fully warrant the Court in exercising its power of review in order that these clear distinctions in the two laws and the clear reason for the distinction may be considered and determined by the Court, as we believe has never yet been done, and as respondent's counsel conceded when at page 15 of their brief they say:

> "We frankly concede our inability to find any decision of this court which passes directly upon this aspect of the provisions of the act and of the order of the Commission relating to 'efficient hand brakes'."

Although the petitioners here seek a review of the decision of a state court, and not a review of a decision of a Circuit Court of Appeals in conflict with the decision of another Circuit Court of Appeals, yet as respondent contends that the decision of the state court is in harmony with the decision of the Seventh Circuit Court of Appeals in Spotts v. Baltimore & Ohio R. Co., 102 F. (2d) 160, and that that case is in conflict with the decision of the Sixth Circuit Court of Appeals in Grand Trunk R. Co. v. Holstein, 67 F. (2d) 780, it would seem that the Court in the exercise of sound judicial discretion might very properly grant the petition and review the decision of the state court in order that the important federal questions involved in that decision and in the conflicting decisions of the circuit courts of appeals of the Sixth Circuit and the Seventh Circuit may be definitely and finally settled by the decision of this Court in this case. This is an important question of federal law which has not been, but should be, settled by this court and it would seem to call for the exercise of this Court's power of supervision within the meaning of the Rules relating to review on writs of certiorari.

Respectfully submitted,

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